THE GOOGLE BOOK SETTLEMENT AS COPYRIGHT REFORM

PAMELA SAMUELSON*

This Article explains that certain features of U.S. law, particularly copyright law, contributed to Google's willingness to undertake the Google Book Search (GBS) project in the first place and later to its motivation to settle the lawsuit charging Google with copyright infringement for scanning in-copyright books. Approval of this settlement would achieve several copyright reforms that Congress might find difficult to accomplish, some of which would be in the public interest. This Article considers whether the quasi-legislative nature of the GBS settlement is merely an interesting side effect of the agreement or a reason in favor of or against approval of this settlement.

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INTRODUCTION

In October 2008, Google proposed to settle a lawsuit charging it with copyright infringement for scanning millions of in-copyright books through an agreement that would transform the firm's current snippet-providing Google Book Search (GBS) service into an online bookstore

and subscription service.[1] Google negotiated this settlement with representatives of the Authors Guild, who purported to be acting on behalf of all authors holding U.S. copyright interests in one or more books that are or may become part of the GBS corpus, and with representatives of the Association of American Publishers (AAP), who purported to be acting on behalf of all publishers with similar interests.[2]

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1. *See* Amended Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Nov. 13, 2009), *available at* http://thepublicindex.org/docs/amended_settlement/amended_settlement.pdf; Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-JES (S.D.N.Y. Oct. 28, 2008), *available at* http://www.googlebooksettlement.com/intl/en/Settlement-Agreement.pdf; Google has recently launched its Google eBookstore service through which more than 3 million books are available. *Discover More Than 3 Million Google eBooks from Your Choice of Booksellers and Devices*, THE OFFICIAL GOOGLE BLOG, (Dec. 6, 2010, 07:00:00 AM), http://googleblog.blogspot.com/2010/12/discover-more-than-3-million-google.html; GOOGLE EBOOKSTORE, http://books.google.com/ebooks (last visited Feb. 11, 2011).

2. The initial GBS Settlement Agreement defined the class in § 1.142 as "all Persons that, as of the Notice Commencement Date [Jan. 5, 2009], have a copyright interest in one or more Books or Inserts." Settlement Agreement, *supra* note 1, at 17 (although Google and its executives, employees, and board members were excluded). This class included all foreign owners of copyrights in books owing to international treaty obligations. *See, e.g.*, 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND § 6.89, at 310 (2d ed. 2006). Many foreign publishers and authors, as well as the governments of France and Germany, objected to the inclusion of foreign books in the settlement. *See, e.g.*, Objections of Harrassowitz, Media24, Studentlitteratur AB, Norstedts Förlagsrupp AB, Norstedts Kartor AB, and Leopard Förlag AB to Proposed Settlement and Brief of Amici Curiae Börsenverein des Deutschen Buchhandels, Schweizer Buchhändler – Und Verleger–Verband SBVV, Hauptverband des Österreichischen Buchhandels, and Svenska Forläggareföreningen, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Aug. 31, 2009) [hereinafter Harrassowitz Objections], *available at* http://thepublicindex.org/docs/objections/harrassowitz.pdf; Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the French Republic, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Sept. 8, 2009) [hereinafter French Republic Opposition Memorandum], *available at* http://thepublicindex.org/docs/letters/french_republic.pdf; Memorandum of Law in Opposition to the Amended Settlement Agreement on Behalf of the Federal Republic of Germany, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Jan. 28, 2010) [hereinafter German Opposition Memorandum], *available at* http://thepublicindex.org/docs/amendedsettlement/Germanyobjection.pdf. In response to these objections, the parties amended the settlement in a manner that narrowed the scope of the class considerably. *See* Amended Settlement Agreement, *supra* note 1, at § 1.13, at 3 (defining "Amended Settlement Class"); *id.* § 1.19, at 4–5 (defining "Book"). The Authors Guild and AAP were identified in the Amended Settlement Agreement (ASA) as associational plaintiffs in the *Authors Guild* litigation. *See id.* § 1.15, at 4. Representatives of these two associations were active participants in the negotiations leading up to the settlement agreement announced on October 28, 2008. For the sake of simplicity, this Article focuses on how the settlement would have affected owners of copyrights in books; it gives relatively little attention to the interests of owners of copyrights in inserts (e.g., separately authored book chapters in edited

A federal judge held a hearing in February 2010 about whether the settlement was "fair, reasonable, and adequate" to the class on whose behalf it was negotiated; in March 2011, he ruled that the GBS settlement did not satisfy this standard.[3]

An intriguing way to view the GBS settlement is as a mechanism through which to achieve copyright reform that Congress has not yet been and may never be willing to do.[4] The GBS settlement resembles legislation in many respects. It would, in effect, give Google a

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volumes or forewords written by someone other than the author of the book), although these interests are quite important and the interests of these copyright owners are in some important respects different than the interests of book copyright owners. For example, owners of copyrights in inserts could not have received more than $500 total for Google's commercialization of their inserts. *Id.* attachment C, at § 1.2 (a), (b), (h); *see also* Objections of Arlo Guthrie, Julia Wright, Catherine Ryan Hyde, and Eugene Linden to Proposed Settlement Agreement at 21–22, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Sept. 2, 2009) [hereinafter Guthrie Objections], *available at* http://thepublicindex.org/docs/objections/guthrie.pdf.

3. FED. R. CIV. P. 23(e)(2) requires that a court hold a hearing to determine that the proposed settlement is "fair, reasonable, and adequate" to the class on whose behalf it was negotiated and that other Rule 23 requirements have been met. The fairness hearing on the GBS settlement was held February 18, 2010. *See* Transcript of Fairness Hearing, *Authors Guild, Inc. v. Google, Inc.*, Case No. 05-CV-8136-DC (S.D.N.Y. Feb. 18, 2010), *available at* http://thepublicindex.org/docs/case order/fairness-hearing-transcript.pdf. The court's order rejecting the settlement was rendered on March 22, 2011. *Authors Guild*, No. 05-CV-8136-DC, slip op.

The GBS settlement has given rise to considerable commentary. *See, e.g.*, Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227 (2009); James Grimmelmann, *The Google Book Search Settlement: Ends, Means, and the Future of Books*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (Apr. 2009), http://www.acslaw.org/node/13228; Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19 (2010); Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308 (2010). For a discussion of its antitrust implications, see, for example, Einer Elhauge, *Why the Google Books Settlement Is Procompetitive*, 2 J. LEGAL ANALYSIS 1 (2010); Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMPETITION L. & ECON. 383 (2009).

4. The intriguing idea of conceiving of the settlement as a way to achieve copyright reform was first planted in my mind in the spring of 2009 by Dan Clancy, then the Engineering Director of the GBS Project, when he was trying to persuade me to support the proposed settlement. The gist of his argument was that the settlement was the only way to free up access to digital copies of millions of out-of-print books because Congress was dysfunctional in dealing with copyright issues. It was a clever opening gambit because although Clancy and I had not previously met, he had obviously been advised by those who knew me that this pitch would be appealing for two reasons: first, because I would likely share his skepticism about Congress as an instrument of public-interest-oriented, forward-looking copyright policy, and second, because as an academic, I could be expected to want Google to be able to offer greater access to books through GBS, and thus on a purely utilitarian calculus, I would likely come down in favor of the settlement.

compulsory license to commercialize millions of out-of-print books, including those that are "orphans" (that is, books whose rights holders cannot readily be located),[5] establish a revenue-sharing arrangement as to these books, authorize the creation of an institutional subscription database (ISD) that would be licensed to libraries and other entities, resolve disputes between authors and publishers over who owns copyrights in electronic versions of their books, provide a safe harbor for Google for any mistakes it might make in good faith as to which books are in the public domain or in copyright, and immunize libraries from secondary liability for providing books to Google for GBS, among other things.[6] The grant of compulsory licenses, the establishment of default allocations of rights, and safe harbors from copyright liability are the kinds of measures that can generally be accomplished through legislation but not through the adjudication of lawsuits.

Part I explains that Google may have undertaken the GBS project in part as a way to accomplish a measure of copyright reform that Congress has not and may never achieve. Strangely enough, however, Google's interest in settling the *Authors Guild* lawsuit may also have been influenced in part by its judgment that the settlement the plaintiffs were offering would bring about more copyright reform that would benefit the firm than Google could reasonably expect from Congress.

Part II discusses numerous aspects of the proposed GBS settlement that would achieve some significant copyright reforms that Congress would find difficult to accomplish. Some of these reforms, such as the privilege that the settlement would provide to nonprofit libraries to allow scholars and students to make non-consumptive research uses of GBS books and free public access to out-of-print books that Google intended to provide to public libraries, would seem to be in the public interest.

Part III suggests that the legislative nature of the GBS settlement is not merely an interesting side effect of the agreement. Nor is it a persuasive rationale for approving the GBS settlement. Some U.S. Supreme Court precedents suggest that reforms as extensive as those embodied in the GBS settlement are inappropriate for resolution through a class action settlement.[7] This Article argues that the legislative nature of the GBS settlement is instead a reason why courts should engage in heightened scrutiny when considering whether a settlement such as this is in compliance with due process norms

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5. Orphan works are discussed *infra* Part II.D.

6. These aspects of the GBS settlement are discussed at length *infra* Part II.

7. Particular attention is paid to *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997). Judge Chin relied in part on *Amchem* in ruling against the GBS settlement. *Authors Guild*, No. 05-CV-8136-DC, slip op. at 20–23.

embodied in Rule 23 of the Federal Rules of Civil Procedure, which sets forth the requirements for both maintaining and settling class action lawsuits.

I. CERTAIN FEATURES OF U.S. LAW CONTRIBUTED TO THE GBS PROJECT AND TO THE SETTLEMENT

This Part considers some aspects of U.S. law, particularly copyright law, that may have contributed to Google's willingness to undertake the GBS initiative in the first place despite the copyright risks it posed,[8] as well as some features of U.S. copyright law that may have made settlement of the lawsuit attractive to Google, the Authors Guild, and AAP.

A. State University Immunity from Copyright Damages Contributed to GBS

Google's scanning of in-copyright books from the collections of major research libraries, such as the University of Michigan, might never have gotten off the ground but for certain rulings by the Supreme Court interpreting the Eleventh Amendment to the U.S. Constitution.[9] The Court has construed this amendment as granting states and state-related entities sovereign immunity from lawsuits seeking money damages.[10] Scholarly criticisms of the Court's Eleventh Amendment

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8. *See* Complaint, *McGraw Hill Co. v. Google, Inc.*, No. 05-CV-8881 (S.D.N.Y. Oct. 19, 2005); Class Action Complaint, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136 (S.D.N.Y. Sept. 20, 2005). For the sake of simplicity the remainder of this Article will refer only to the *Authors Guild* lawsuit, in part because the GBS settlement proposed to meld the publisher lawsuit into the *Authors Guild* case under which there is an Author Subclass and a Publisher Subclass.

9. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. Key decisions include *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (striking down a federal statute that required states to negotiate with Indian tribes over gaming), and *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress lacks power to abrogate state sovereign immunity for lawsuits seeking damages).

10. *See, e.g.*, *Fla. PrePaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (holding that a state entity can raise Eleventh Amendment sovereign immunity as a defense to patent infringement damage claims). This principle also applies to copyright infringement claims. *See, e.g.*, *Salerno v. City Univ. of N.Y.*, 191 F. Supp. 2d 352, 355–56 (S.D.N.Y. 2001). However, state officials can be enjoined from violations of law, *see Ex parte Young*, 209 U.S. 123 (1908), and state employees may be liable for damages for wrongful acts undertaken on behalf of their employers. *See, e.g.*, Jesse H. Choper & John C. Yoo, Essay, *Who's Afraid of the*

jurisprudence have thus far not shaken the Court's conviction that its interpretation of that amendment is sound.[11]

In keeping with the Supreme Court's Eleventh Amendment rulings, some courts have held that state universities cannot be found liable in damages for infringement of copyrights.[12] These courts have also questioned whether Congress can override the state sovereign immunity norm even when evidence exists that state actors are engaged in or contributing to ongoing infringement.[13]

The Court's Eleventh Amendment jurisprudence may have emboldened officials at the University of Michigan and other state universities (e.g., the Universities of California, Texas, and Wisconsin) to make deals with Google to scan millions of books from their vast collections,[14] including in-copyright books. These libraries and Google may have had confidence that the book scanning would be deemed fair use if tested in the courts, but even if the fair-use defense failed, the worst that could seemingly befall these libraries for giving Google books to scan was an injunction to stop supplying additional books to Google and to cease using the library digital copy (LDC) of in-copyright books that Google supplied to its library partners.[15]

Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings, 106 COLUM. L. REV. 213, 225–26 (2006).

11. *See, e.g.*, Mitchell N. Berman et al., *State Accountability for Violations of Intellectual Property Rights: How to "Fix"* Florida Prepaid *(and How Not To)*, 79 TEX. L. REV. 1037 (2001); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000).

12. *See, e.g.*, *Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000) (holding the University of Houston immune from damage liability for copyright infringement).

13. *Id.* at 604–07.

14. Copies of several contracts between Google and its library partners are available at THE PUBLICINDEX, http://thepublicindex.org/documents/libraries/ (last visited Jan. 30, 2011). Even if some librarians believed in Google's fair-use defense, university administrators and counsel may have been more willing to participate in this book-scanning effort because they knew that the Eleventh Amendment would shield their endowments.

15. "Library Digital Copy" is defined in the ASA as "the set (or portion thereof) of all Digital Copies of Books in a Fully Participating Library's Collection, which Digital Copies are made by copying the Library Scan . . . and which Google provides to the Fully Participating Library." Amended Settlement Agreement, *supra* note 1, § 1.81, at 12. The ASA also sets forth certain procedures by which a library can become a "Fully Participating Library." *Id.* § 7.1, at 90–91; *see also id.* attachment B1.

The University of Michigan, for example, offered Google the opportunity to scan nearly eight million books from its collection.[16] The University of California has committed to supplying Google with 2.5 million books.[17] Other state universities have made similar, albeit sometimes more modest, deals.[18] Private university partners have, however, been more circumspect. Harvard and Stanford, for example, have generally supplied only public domain books for GBS, in part because these institutions did not want to risk copyright liability that might diminish the large endowments on which they depend.[19]

Google has been making public-domain copies of books in the GBS corpus freely available for downloading.[20] It serves up "snippets" (a small number of words to show the context in which search words appear in books) of the contents of in-copyright books in response to user queries. Google provides links to sites from which the books can be borrowed or purchased. Libraries benefit because the links facilitate better access to books in their collections; publishers and authors also benefit insofar as some users choose to buy copies of the books rather than to borrow them.[21]

If one favors the development of a digital corpus of books such as GBS, one might well applaud, rather than denounce, the Eleventh Amendment jurisprudence that gave Michigan and other state universities confidence that they could authorize Google to scan books in their collections without risking copyright damages for doing so.

Publishers are aware that the Eleventh Amendment is an impediment to lawsuits against state universities' libraries.[22] Without

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16. Letter from Paul Courant, Univ. Librarian & Dean of Libraries, Univ. of Mich. to The Honorable Denny Chin, Judge, S. Dist. N.Y. (Sept. 4, 2009), *available at* http://thepublicindex.org/docs/letters/Courant.pdf.

17. Cooperative Agreement, Google, Inc. & Univ. of Calif. Regents § 2.2, at 2 (Aug. 3, 2006), *available at* http://thepublicindex.org/docs/libraries/california.pdf.

18. For cooperative agreements between Google and the Universities of Texas, Virginia, and Wisconsin, see THE PUBLICINDEX, *supra* note 14.

19. *See, e.g.*, Jeffrey Toobin, *Google's Moon Shot*, NEW YORKER, Feb. 5, 2007, at 30, 33.

20. Google has not claimed copyright in its digitized version of these books, and indeed it could not do so because the digitized copies do not exhibit the modicum of creativity required to support a copyright. *See, e.g.*, *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191, 196-97 (S.D.N.Y. 1999). However, Google has watermarked the digitized books and instructs users to make only noncommercial uses of these books and to maintain Google's watermarks.

21. By linking to bookstores, GBS facilitates user purchases of books, suggesting that the snippet service would enhance the market for books, not harm it, which would seem to help Google's fair-use defense.

22. *See, e.g.*, Declaration of Richard Sarnoff in Support of Plaintiffs' Motion for Final Approval of Amended Settlement Agreement at 3, *Authors Guild, Inc. v. Google Inc.*, No. 05 CV 8136 (DC) (S.D.N.Y. Feb. 11, 2010), *available at*

this immunity, state universities could be charged with contributory infringement for supplying Google with millions of in-copyright books for GBS and for uses made of the LDCs that Google is supplying to its library partners.[23]

B. Certain Fair-Use Rulings Contributed to GBS

The United States is one of the very few countries with a broadly applicable fair-use limit on the scope of copyright protection.[24] Even if a person has engaged in unauthorized acts that implicate an exclusive right granted to copyright owners, a use that is "fair" is not an infringement.[25] Four factors are typically considered in judging the fairness of a use: the purpose of the use, the nature of the copyrighted work, the amount and substantiality of the taking, and the harm the use may cause to the market for the protected work.[26] Criticism, comment, news reporting, teaching, scholarship, and research are among the favored purposes, although courts have not limited fair use to only these.[27] Whether the use is for commercial or nonprofit educational purposes is also relevant.[28]

At first blush, Google's fair-use defense for scanning millions of in-copyright books might seem implausible.[29] Google's purpose in scanning these books can be viewed as commercial, which tends to weigh against fair use.[30] Whole works were being copied on a

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http://thepublicindex.org/docs/amended_settlement/richard_sarnoff_declaration.pdf (recognizing the likelihood of state sovereign immunity defenses if publishers sued state universities for providing books to Google).

23. *See* Amended Settlement Agreement, *supra* note 1, § 7.2(a), at 91–92.

24. *See, e.g.*, Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 87 (2000). Under other nations' copyright laws, Google's scanning of books would most likely be found to infringe copyrights. *See, e.g.*, Lance Whitney, *Google Loses French Copyright Case*, CNET NEWS, (Dec. 18, 2009, 8:13 AM), http://news.cnet.com/8301-1023_3-10418319-93.html (holding that scanning books for GBS in the United States infringes French rights holders' copyrights).

25. 17 U.S.C. § 107 (2006).

26. *Id.* Harm to potential markets is also relevant to whether a use is fair.

27. *Id.*

28. *Id.*

29. *See, e.g.*, ROBIN JEWELER, CONG. RES. SERVICE, THE GOOGLE BOOK SEARCH PROJECT: IS ONLINE INDEXING FAIR USE UNDER COPYRIGHT LAW? (2005); *see also* SIVA VAIDHYANATHAN, THE GOOGLIZATION OF EVERYTHING: AND WHY WE SHOULD WORRY 165–72 (2011) (asserting that GBS scanning is not fair use).

30. An important purpose for Google in scanning these books was to improve the precision of its search engine and draw more users to it. *See infra* notes 146–48 and accompanying text. The Supreme Court has sometimes viewed commercial uses as

systematic basis, which also disfavors fair use.[31] Harm to the market is often presumed from an unauthorized use,[32] but it is also plausible that some harm might result from Google's use of the books (e.g., if hackers "liberated" the books by cracking technical protections on Google's servers, the books could then circulate freely on the Internet).[33] Moreover, digitizing books to serve snippets might impede a new licensing market for rights holders.[34]

Yet, Google had reason to believe that digitizing in-copyright books for purposes of indexing their contents and providing snippets was fair use after an important appellate court ruling in *Kelly v. Arriba Soft Corp.*[35] Arriba Soft developed a search engine for images. It used web-crawling software to copy images from open sites on the Internet. It then made thumbnail-size copies to serve up in response to user queries (e.g., for photos of the Grand Canyon).[36] It also provided links to sites where the full-size images could be found. Kelly, a commercial photographer, sued Arriba Soft after he discovered that it was publicly displaying thumbnails of various photographs of the American West that Kelly had posted on his website.[37] He claimed that making thumbnail-size images of his photos without a license was infringement.[38]

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disfavored. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

31. *See, e.g.*, *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 913 (2d Cir. 1994) (holding that systematic copying of articles by commercial research scientists is not fair use).

32. Until recently, it has been common for courts in copyright cases to presume harm from unauthorized commercial uses of protected works. *See, e.g.*, *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995). However, this ruling is arguably inconsistent with the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (holding that plaintiffs in patent cases bear the burden of proving all four elements of traditional principles of equity, including proof that harm will be irreparable if an injunction is not issued, relying on its prior rulings in copyright cases). The Second Circuit has concluded that harm should no longer be presumed in copyright cases. *See Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010).

33. *See, e.g.*, Douglas Lichtman, *Copyright as Information Policy: Google Book Search from a Law and Economics Perspective*, *in* 9 INNOVATION POLICY AND THE ECONOMY 55, 66–67 (Adam B. Jaffe, Josh Lerner & Scott Stern eds., 2008).

34. *Texaco*, 60 F.3d at 926–31 (finding that the new licensing market would be thwarted if photocopying articles were held fair).

35. 336 F.3d 811 (9th Cir. 2002).

36. *Id.* at 815.

37. *Id.*

38. Kelly apparently did not claim that copying done by the web-crawling software or in the database prior to making thumbnail-sized images were infringements, perhaps because these intermediate copies were likely be fair uses under *Sega Enterprises v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992). Web-crawling and cache

The Ninth Circuit ruled that Arriba Soft had made fair use of Kelly's images. It characterized Arriba Soft's thumbnails as "transformative," in part because the thumbnails were smaller in size and of lower resolution than Kelly's full-sized images.[39] In addition, Arriba Soft's thumbnails "served an entirely different function than Kelly's original images,"[40] because Arriba Soft had created the thumbnails to "improv[e] access to information on the Internet," not to supplant demand for the aesthetic experience that Kelly's photos might evoke.[41]

Although the photographs were creative works, Kelly had published them on the open Internet. It was, moreover, "necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site."[42] Because Arriba Soft helped prospective purchasers find Kelly's photos,[43] the court found no harm to Kelly's market.[44]

Kelly augured well for Google's fair-use defense in the *Authors Guild* case. Like Arriba Soft, Google scans in-copyright works for purposes of facilitating better access to them. The copying of entire works is necessary to create an index. Google also displays only a small number of words ("snippets") from the books in response to user queries, akin to the thumbnails in *Kelly*. There is thus very little risk of supplanting demand for the books. As in *Kelly*, Google links to sites from which the works could be purchased, and this is likely to enhance the market for them.

A second appellate court decision relevant to Google's fair-use defense is *Perfect10 v. Google, Inc.*.[45] As in *Kelly*, the main issue was whether a search engine was liable for copyright infringement for displaying thumbnails of images in response to user queries. One key difference between *Kelly* and *Perfect10* was that the thumbnails in the

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copying of copyrighted works were unsuccessfully challenged as infringements in *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006), discussed later. *See infra* notes 48–55 and accompanying text.

39. *Kelly*, 336 F.3d at 818–19.

40. *Id.* at 818.

41. *Id.* at 819.

42. *Id.* at 821.

43. The Ninth Circuit also considered that Arriba Soft's thumbnail images lost clarity if someone tried to enlarge them, which is why they could not supplant demand for good-resolution images, which is an especially important feature of photographic images. Moreover, Kelly did not license or sell thumbnails, so the Arriba Soft thumbnails were not displacing this market. *Id.* at 821–22.

44. *Id.*

45. 416 F. Supp. 2d 828 (C.D. Cal. 2006), *aff'd in part, rev'd in part sub nom. Perfect10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

latter case were of photographs posted on the Internet without the copyright owner's permission.[46] However, because Google had no way of knowing which images were infringing—at least not until Perfect10 sent a proper notice-and-takedown request—the court regarded Google's fair-use defense as sound as Arriba Soft's.[47] The *Perfect10* decision gave Google reason to believe that the *Kelly* decision would not be limited to situations in which the copyright owner him- or herself had posted the content online.

Also bolstering Google's fair-use defense is *Field v. Google Inc.*[48] Field charged Google with copyright infringement because Google's web-crawler software made copies of his writings, stored the copies in caches, and showed snippets of his writings in response to user queries.[49] Google claimed these acts were fair use.[50]

The court viewed positively the purposes served by Google's web-crawling and caching activities, such as enabling searches for content when the original page was inaccessible, detecting changes in website content over time, and assessing why the site was responsive to the search-query term.[51] As in *Kelly*, the court concluded that Google's copying was transformative because of the different functions that the copies served on Field's website, on the one hand, and in Google's cache, on the other.[52] Google's good faith in operating its system cache was evident from its willingness to take down any cached content after receiving notice of its owner's objection.[53] The court also noted the exceptionally high transaction costs that Google would have to incur if it had to seek and obtain permission for every copy its web-crawlers

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46. Adam W. Sikich, *Fair or Foul? The Unanswered Fair Use Implications of the Google Library Project*, 2 LANDSLIDE 24, 25–26 (2009).

47. Perfect10 also argued that Google was interfering with a licensing market for thumbnails of its images and that Google's use of the images was commercially harmful because of revenues it made from the AdSense program. The Ninth Circuit regarded the harm evidence to be too speculative to change the fair-use calculus. *Perfect10*, 508 F.3d at 1165–68.

48. 412 F. Supp. 2d 1106 (D. Nev. 2006); *see also Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 495, 504 (E.D. Pa. 2006) (affirming dismissal of direct and indirect infringement claims for web-crawler copying of writings freely available on the Internet), *aff'd*, 242 Fed. App'x 833 (3d Cir. 2007).

49. *Field*, 412 F. Supp. 2d at 1109, 1114. Field sought $2.55 million in statutory damages ($50,000 per infringed work). *Id.* at 1110.

50. *Id.* at 1109. Google also argued there was no direct infringement by virtue of automated copying by its web-crawling and caching software, and raised implied license and estoppel defenses. *Id.* The court granted Google's summary judgment motion on all grounds. *Id.*

51. *Id.* at 1118–19.

52. *Id.*

53. *Id.* at 1122–23.

made of Internet content.[54] There was, moreover, a simple technological fix available to Field if he didn't want his content to be web-crawled.[55]

Field aids Google's GBS fair-use defense in several respects.[56] For one thing, the court in *Field* regarded Google's provision of snippets from copyrighted texts as non-infringing. Second, the court accepted that it was necessary for search engines to make copies of texts in order to index contents and make snippets available. Third, the court also considered Google's willingness to remove content from its servers if copyright owners objected as also cutting in favor of fair use. Fourth and perhaps most importantly, the court accepted that Google would have to incur unreasonably high transaction costs to clear the rights to make copies of website contents for purposes of providing snippets to users of its search engine. Field might want to license Google's use of his works, but this was not considered a cognizable harm to the market. Indeed, as in *Kelly*, the court thought that by facilitating greater access to works on the Internet, Google was helping rather than interfering with market opportunities for copyright owners.[57]

While none of these decisions was rendered in the Second Circuit, where the *Authors Guild* case is pending, the decisions are consistent, well-reasoned, and written in reasonably broad language.[58] Some Second Circuit cases have, moreover, cited the *Kelly* and *Perfect10*

54. *See id.* at 1112. Field had created all fifty-one allegedly infringed writings in a three-day period before posting them on his website. *Id.* at 1114. A factor that ultimately weighed heavily against Field's copyright claims was the court's perception that he had "manufacture[d]" his claims of infringement "in the hopes of making money from Google's standard practice." *Id.* at 1113–14.

55. Field knew that he could use a robots.txt file to signal that he did not want data on his site to be web-crawled and that he could ask Google not to supply cached links to his writings. *Id.* at 1113–14. Indeed, he created a robots.txt file that signaled that robots were allowed to copy his data. *Id.* at 1114.

56. The *Perfect10* and *Field* cases and their implications for GBS are analyzed in Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1677–79 (2009).

57. *See, e.g.*, Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privilege of Categories*, 60 VAND. L. REV. 135, 182 (2007); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2610–15 (2009) (discussing the information-access cases). A modest number of sentences from the *Unbundling* article have been converted for this article.

58. The law review commentary on Google's fair-use defense in the *Authors Guild* case is generally supportive. *See, e.g.*, Band, *supra* note 3, at 237–60; Sag, *supra* note 3, at 23; Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors or Napster for Books?*, 61 U. MIAMI L. REV. 87, 91–94 (2006) (arguing that scanning books to index them is fair use).

decisions approvingly.[59] Without these precedents, Google might well have been more reluctant to scan in-copyright books from university libraries. The search-engine fair-use cases thus seem to be contributing factors to the GBS project.

The authors and publishers who sued Google contest the fairness of scanning books to provide snippets.[60] If the *Authors Guild* litigation resumes in the aftermath of the settlement's rejection,[61] they will either attack the soundness of the search-engine fair-use rulings or try to distinguish them from GBS. For example, a key difference between the *Kelly* and *Field* cases on the one hand and the *Authors Guild* case on the other is that Kelly and Field had voluntarily posted their works online, whereas the authors of books scanned from collections of Google's library partners had not consented to digitization. The *Perfect10* case, like the *Authors Guild* case, involved links to unauthorized copies of copyrighted works. However, Google was unaware of the unauthorized status of Perfect10's photos when it made web-crawler copies of the photos and created the thumbnails and links. In the *Authors Guild* case, by contrast, Google was the maker of the unauthorized copies.

Some Second Circuit case law, moreover, casts doubt on Google's fair-use claim. In *American Geophysical Union v. Texaco*, for instance, the Second Circuit held that photocopying individual research articles from technical journals for research purposes was an unfair use.[62] The court regarded the Texaco researcher's use to be commercial and consumptive in nature; it was done on a systematic basis, and it

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59. *See, e.g.*, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 611, 613 (2d Cir. 2006); *United States v. Am. Soc'y Composers, Authors & Publishers*, 599 F. Supp. 2d 415, 426, 431 (S.D.N.Y. 2009).

60. *See, e.g.*, Patricia Schroeder, *Google Cannot Rewrite U.S. Copyright Laws*, WALL ST. J., Oct. 20, 2005, at A15. Schroeder was CEO of AAP at the time he published this article. The Guild's hostility to GBS is evident from the lawsuit it filed against Google.

61. The *Authors Guild* case is in the very early stages of litigation. Very little discovery has been conducted. No depositions have been taken, and the class has not been certified. Without class certification—which Google can be expected to contest vigorously—the Authors Guild may not be able to persuade its lawyers to continue the litigation, for they would face years of intensive litigation without Google's deep pockets. The trade publishers may also be disinclined from pursuing their lawsuit against Google, as their books are in the GPP and they too lack Google's deep pockets and stomach for lengthy litigation.

62. 60 F.3d 913 (2d Cir. 1994). The *Texaco* case is discussed at greater length at notes 281–83 and accompanying text. *See also UMG Recordings, Inc. v. MP3.com, Inc.*, 2000 WL 1262568, at *3 (S.D.N.Y. Sept. 6, 2000) (holding that it is not fair use to create a database of sound recordings to facilitate access by MP3.com subscribers who owned copies of specific recordings).

was likely to harm an emerging licensing market.[63] Google's fair-use defense also seems questionable given the narrowness of the existing statutory library privileges.[64]

If Google recognized that its fair-use defense was not a sure winner, this may have contributed to its receptivity when representatives of the Authors Guild and AAP approached it to suggest a settlement of the litigation that would allow Google not only to continue to scan in-copyright books, but also to commercialize them.[65]

C. The Narrowness of Library Privileges Contributed to GBS

Section 108 of Title 17 governing copyright law shields libraries from copyright liability for making and distributing copies of copyrighted works for specific purposes, such as preservation and replacement of damaged materials.[66] Although § 108 was updated modestly in 1998 as part of the Digital Millennium Copyright Act (DMCA),[67] there is general consensus that this provision needs to be updated in a more fundamental way now that digital information resources have become more pervasive components of library services and digital access to knowledge is becoming an increasingly important way for libraries to serve their communities.[68]

At present, § 108 does not authorize libraries to digitize all in-copyright books in their collections, even for preservation purposes, let alone make digital copies available to their patrons without permission

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63. *Texaco*, 60 F.3d at 917–31.

64. *See* 17 U.S.C. § 108 (2006). This privilege is discussed later in notes 66–70 and accompanying text.

65. *See* Andrew Richard Albanese & Jim Milliot, *Richard Sarnoff: PW's Publishing Person of the Year*, PUBLISHERS WKLY., Dec. 7, 2009, http://www.publishersweekly.com/pw/print/20091207/41186-richard-sarnoff-pw-s-publishing-person-of-the-year-.html.

66. § 108(a), (c). For a detailed overview of this provision and the values it embodies, see, for example, Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115, 121–23 (2001).

67. Section 404 of the DMCA allowed libraries and archives to make up to three copies of copyrighted materials, including digital copies, for traditionally privileged purposes instead of the one facsimile copy permitted by the 1976 Act. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 404, 112 Stat. 2860, 2889-90 (1998).

68. *See, e.g.*, SECTION 108 STUDY GROUP, THE SECTION 108 STUDY GROUP REPORT iii-x (2008) (recommending numerous changes to library and archival privilege); *see also* Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. (forthcoming 2010), *available at* http://www.law.berkeley.edu.files.bclt_CPP.pdf (recommending some updates to library and archival privilege).

from the copyright owners. Although a recent report on § 108 reform has urged Congress to expand the library exception in some respects,[69] it does not recommend allowing mass digitization of books in library collections or allowing broad public access to copies made for preservation purposes.[70]

University librarians are very interested in having digital repositories of their books, as physical book collections take up valuable real estate on college campuses and are expensive to build and maintain. Many books are, moreover, in fragile condition, which will only worsen through use of physical copies. Because students are becoming increasingly accustomed to having online access to information resources, physical libraries are visited less frequently now, and there is a real risk that the learning embodied in research-library collections will become virtually invisible unless it can be made available online.[71]

There is reason to doubt that Congress would be willing to amend § 108 to permit mass digitization projects by libraries, or broad public access to digital copies of in-copyright works through digital lending initiatives, because the Authors Guild and AAP publishers would almost certainly oppose this. In the modern era, it is difficult to enact copyright legislation without support of key copyright-industry constituencies.[72]

Google was able to attract major research libraries to become partners in GBS because it was willing to scan books from their collections, give libraries LDC copies of the books, and defend these acts as fair uses. Even if research librarians firmly believed that scanning books to index them and provide snippets was fair use, they may have been reluctant to undertake a similar project because their institutions lacked the financial resources to undertake mass digitization projects and defend copyright lawsuits.

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69. The Section 108 Study Group recommends, for example, that libraries should be able to outsource some of their privileged uses to contractors and to make some preservation copies of texts. SECTION 108 STUDY GROUP, *supra* note 68, at iv-vii.

70. Copyright is not, of course, the only impediment to university library-digitization projects. Two others are the cost of digitization, estimated at roughly $30 per book, and the cost of attempting to clear rights to digitize in-copyright books, which one source has estimated at roughly $1000 per book. Band, *supra* note 3, at 228–29.

71. *See, e.g.*, Letter from Michael Keller, Librarian & Dir. Academic Info. Res., Stanford Univ. to The Honorable Denny Chin, Judge, S. Dist. N.Y., (Sept. 8, 2009), *available at* http://thepublicindex.org/docs/letters/Stanford%20Libraries.pdf. Many universities are making textual materials available through electronic reserves, although this practice is controversial with publishers. *See, e.g.*, Gasaway, *supra* note 66, at 149–50.

72. *See, e.g.*, JESSICA LITMAN, DIGITAL COPYRIGHT 22–23 (2001).

Google's library partners were pleased with their initial deal under which they would also get LDCs with which to make fair and other privileged uses of in-copyright books. They and their patrons would benefit from snippet access to book contents along with links to places from which physical books could be obtained.

But of course, the Holy Grail for libraries was providing online access to all books in their collections. A fair-use victory in the *Authors Guild* lawsuit would not have given Google the right to display more than snippets. So when Google approached its library partners about a proposed settlement of the *Authors Guild* lawsuit that would give the libraries online access to millions of books, it was hard not to be giddy about it, especially since at least some terminals would be available to higher-education institutions for free.[73] Full access for all patrons to all books in the ISD would be possible through subscriptions.[74]

The proposed settlement thus looked like a win-win-win: the libraries would get access to millions of books, Google would be able to recoup its investment in GBS, and authors and publishers would get a new revenue stream from books that had been yielding zero returns. And legislation would be unnecessary to bring about this result.

D. Inaction on Orphan-Works Legislation Contributed to GBS

Google was in the early stages of its GBS project when the U.S. Copyright Office launched a study to consider whether Congress should enact legislation to facilitate greater access to "orphan works," a term that typically refers to in-copyright works whose rights holders cannot be located through a reasonably diligent search.[75] Google, the Authors Guild, AAP, and major library associations urged the Office to support orphan-works legislation.[76] The Office eventually published a report

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73. Amended Settlement Agreement, *supra* note 1, § 4.8, at 74–75.

74. *Id.* § 4.1, at 50–58. The settlement would also have authorized libraries to make certain uses of their LDCs beyond the privileges that § 108 provides. *Id.* § 7.2, at 91–102.

75. *See* U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS 1 (2006).

76. Letter from Allen Adler, Vice President for Legal & Gov't Affairs, Ass'n of Am. Publishers, to Jule L. Sigall, Assoc. Register for Pol'y & Int'l Affairs, U.S. Copyright Office (March 24, 2005), *available at* http://www.copyright.gov/orphan/comments/OW0605-AAP-AAUP-SIIA.pdf; Letter from Paul Aiken, Exec. Dir., Authors Guild, to Jule L. Sigall, Assoc. Register for Pol'y & Int'l Affairs, U.S. Copyright Office (May 9, 2005), *available at* http://www.copyright.gov/orphan/comments/reply/OWR0135-AuthorsGuild.pdf; Letter from David Drummond, Vice President, Corporate Dev. & Gen. Counsel, Google Inc., to Jule L. Sigall, Assoc. Register for Pol'y & Int'l Affairs, U.S. Copyright Office (March 25, 2005), *available at* http://www.copyright.gov/orphan/comments/OW0681-Google.pdf; Letter from

recommending legislation to make orphan works more widely available.[77] Congress has, however, yet to pass such a bill.[78]

A significant contributing cause of the orphan-works problem has been numerous copyright-term extensions enacted by Congress in the past few decades.[79] Although the commercial life of most books is relatively short (i.e., they generally remain "in print" for fewer than five years),[80] copyright terms have become both significantly longer and more indefinite in duration. For example, when a research library in 1960 bought new books for its collection, it would have known that the books would likely be free of copyright constraints after 1988.[81] While copyrights could be renewed,[82] there was little reason to do so if the book had been out-of-print for some years. Books would thus generally be in the public domain in fewer than three decades.

The Copyright Act of 1976 radically changed the approach to copyright duration and slowed considerably the flow of books into the public domain. For books published after 1977, copyrights would no longer expire in the early 2000s, as they would have previously, because the 1976 Act granted authors and their heirs a copyright term that extended fifty years beyond the authors' deaths.[83] This roughly tripled the effective life of most copyright terms.[84]

The life-plus-fifty-years model also made the copyright duration considerably more uncertain. It is, for example, impossible to know

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Library Copyright Alliance to Patrick J. Leahy, Senator, Chairman, Comm. on the Judiciary, Orrin Hatch, Senator, U.S. Congress (June 17, 2008), *available at* http://www.arl.org/bm~doc/lca-senate-orphan-works-s-2913-17june2008final.pdf.

77. U.S. COPYRIGHT OFFICE, *supra* note 75, at 93–127.

78. *See, e.g.*, Shawn Bently Orphan Works Act of 2008, S. 2913, 110th Cong. (2008) (referred to House Committee on the Judiciary in 2008); Public Domain Enhancement Act, H.R. 2408, 109th Cong. (2005) (referred to the House Subcommittee on Courts, the Internet, and Intellectual Property in 2005). There is, however, presently no orphan-works bill pending in either the House or the Senate.

79. U.S. COPYRIGHT OFFICE, *supra* note 75, at 3.

80. Laura N. Gasaway, *America's Cultural Record: A Thing of the Past?*, 40 HOUS. L. REV. 643, 660 (2003) (reporting that 90 percent of book sales happen in the first year after publication and books are largely out of print after three years).

81. Act of Mar. 4, 1909, ch. 320, §23, 35 Stat. 1077, 1080 (codified as amended at 17 U.S.C. §§ 302–04 (2006)) (providing for an initial copyright term of twenty-eight years and an opportunity to renew copyrights for an additional twenty-eight years).

82. The Copyright Office would have records of any renewal of copyright, as registration of the renewal was required for it to be effective. *Id.*

83. Copyright Act of 1976, Pub. L. No 94-553, § 101, 90 Stat. 2541, 2572 (codified as amended at 17 U.S.C. § 302(a) (2006)).

84. Congress also extended the terms of in-copyright works published before 1978 to seventy-five years from first publication. *Id.* § 101, 90 Stat. at 2574 (codified as amended at 17 U.S.C. § 302(b)).

when the copyright in a book published after 1977 will expire if the author is still alive when it is published, as his or her death date can obviously not be accurately predicted on the book's title page.

Congress enacted a further term extension in 1998 that tacked on an additional twenty years to existing copyrights,[85] although libraries and archives persuaded Congress to mitigate this to some degree through an exception allowing these institutions to copy works for preservation purposes and make them available to scholars and researchers during the extended term.[86]

The orphan-works legislation Congress has considered thus far would require diligent searches for copyright owners on a book-by-book basis.[87] This would seemingly preclude mass digitization projects, such as GBS, because the cost of undertaking diligent searches on a book-by-book basis is very high, perhaps prohibitively so.[88]

Google may have decided to mass digitize books from its library partners' collections in part to make orphan books more accessible. GBS snippets are, after all, providing somewhat greater access to and use of these works. Google has also been making non-display uses of the contents of orphan books (e.g., to refine its automated translation tools).[89] Google may have anticipated that Congress would eventually pass an orphan-works bill that would then allow the firm to expand access to the contents of books it came to believe were orphans. Or in the absence of legislation, Google could have argued that displaying the contents of orphan books was fair use because there could be no harm to the market if the rights holders could not be found. The GBS initiative was thus aimed in part to overcome Congressional inaction on orphan works.

Google's keenest interest in settling the *Authors Guild* case was in the opportunity the settlement would provide to solve the orphan book problem in a cost-effective way, at least for Google.[90] The default rule

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85. Sonny Bono Copyright Term Extension Act, Pub. L. No 105-298, § 102, 112 Stat. 2827, 2827–28 (1998) (codified as amended at 17 U.S.C. § 302(a)).

86. § 104, 112 Stat. at 2829. This exception is only available in the last twenty years of copyright terms and then only if copies of the books are no longer commercially available.

87. Shawn Bently Orphan Works Act of 2008, S. 2913, 110th Cong. § 2 (2008).

88. Band, *supra* note 3, at 229 (estimating search costs for clearing rights to digitize books at $1000 per book).

89. I have elsewhere argued that at least some non-display uses of in-copyright books are fair uses. Samuelson, *supra* note 3, at 1363 & n.280. For additional discussion, see also Sag, *supra* note 56, at 1609.

90. *See, e.g.*, Transcript of Fairness Hearing, *supra* note 3, at 145–46 (Google's lawyer, Daralyn Durie, informed Judge Chin that "without this opt-out

of the settlement was that Google could commercialize all out-of-print books in the settlement as long as it shared the revenues with a Book Rights Registry (BRR) whose task would have been to find rights holders whose books were earning money from Google's exploitation.[91]

E. Unclear Ownership of E-Book Rights Contributed to GBS

An additional copyright impediment to mass digitization projects, such as GBS, is a lack of clarity as to who owns the rights to authorize the digitization of in-copyright books. There are at least four reasons for this unclarity.[92]

One reason arises from ambiguities in book publishing contracts. The only case to have interpreted common grant language is *Random House, Inc. v. Rosetta Books LLC*.[93] Random House sued Rosetta for infringement after it started selling e-books of works by Kurt Vonnegut and William Styron. These authors' contracts with Random House gave the publisher the exclusive right "to publish . . . [the work] in book form."[94] The trial court construed this phrase as a limited grant and refused to issue a preliminary injunction to stop Rosetta from selling the e-books.[95]

The Second Circuit recognized that "there is some appeal to [the] argument that an 'ebook'—a digital book that can be read on a computer screen or electronic device—is simply a form of a book."[96] However, it observed that "the law of New York, which determines the scope of Random House's contracts, has arguably adopted a restrictive view of the kinds of 'new uses' to which an exclusive license may apply

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regime for works that are not commercially available, there would be no settlement. This is an essential feature of the settlement.").

91. Amended Settlement Agreement, *supra* note 1, §§ 3.2(b), 3.3, at 28, 33–35.

92. A fifth difficulty arises because copyrights are, under the 1976 Act, divisible into a seemingly infinite number of slices. *See* Copyright Act of 1976, Pub. L. No 94-553, § 101, 90 Stat. 2541, 2568 (codified at 17 U.S.C. § 201(d) (2006)). The right to publish a hardcover edition of a book may be owned by one person; the right to print it on demand may belong to a second person; the right to edit the book's contents for an educational reader may belong to a third person; and so on. A would-be digitizer may be unsure which owner to approach.

93. 283 F.3d 490 (2d Cir. 2002).

94. *Id.* at 491.

95. *Id.* at 491–92. For critical commentary on the *Random House* decision, see, for example, Caryn J. Adams, Random House v. Rosetta Books, 17 BERKELEY TECH. L.J. 29 (2002) (arguing that the district court's decision in *Random House* was inconsistent with precedent in New York and the Second Circuit).

96. *Random House*, 283 F.3d at 491 (citations omitted). It is worth noting that the Authors Guild filed an amicus curiae brief in support of Rosetta, and AAP filed an amicus brief in support of Random House. *Id.*

when the contracting parties do not expressly provide for coverage of such future forms."[97] The appellate court affirmed the lower court's ruling, but noted that further fact finding would be necessary to determine whether the trial court's preliminary assessment of the merits of Rosetta's defense was consistent with the reasonable expectations of the parties at the time of contracting.[98] In the meantime, Rosetta Books was free to publish the e-books in question.

The "new and unforeseen uses" problem often arises in copyright, especially when technological advances make possible new media for dissemination of protected works. The "new use" case law is somewhat mixed.[99] Some cases are sympathetic to claims that authors should enjoy new revenue streams when advances in technology have made it possible to sell copies of their works in new formats,[100] while other cases are more receptive to the interests of commercial exploiters on the theory that these entities should enjoy whatever benefits flow from the exploitations that technology advances enable.[101] The *Random House* case seems to fall on the pro-author side as to e-books, but the decision is hotly contested by publishers.[102] Because that decision merely denied Random House's motion for a preliminary injunction, *Random House* is far from a definitive precedent for resolving the author-publisher e-book dispute.

A second problem affecting the rights of authors and publishers to authorize e-books is that many publishing contracts, although by no means all, contain clauses that allow copyrights to revert to authors after the book goes out-of-print. Author reversion clauses are not always self-executing; that is, the copyright does not automatically

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97. *Id.* The interpretation of contracts is, of course, a matter of state law. States may differ in how broadly or narrowly their courts will construe author-publisher contracts. Contract language also varies from one publishing contract to another. See *infra* notes 355–57 and accompanying text concerning the implications of this for approval of the GBS settlement.

98. *Random House*, 283 F.3d at 491–92 ("Without the benefit of the full record to be developed over the course of the litigation, we cannot say the district court abused its discretion in the preliminary way it resolved these mixed questions of law and fact.").

99. *See, e.g.*, *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481 (2d Cir. 1998); *Bourne v. Walt Disney Co.*, 68 F.3d 621 (2d Cir. 1995); *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir. 1968).

100. *See, e.g.*, *N.Y. Times, Co. v. Tasini*, 533 U.S. 483 (2001) (upholding claims of freelance authors for unauthorized licensing of their works in electronic databases).

101. *See, e.g.*, 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.10[B], at 10–85 (Matthew Bender rev. ed. 2010).

102. *See, e.g.*, Motoko Rich, *Legal Battles over E-Book Rights to Older Books*, N.Y. TIMES, Dec. 12, 2009, http://www.nytimes.com/2009/12/13/business/media/13ebooks.html.

revert to the author once the book is no longer being printed and actively sold in new copies. Rather, authors must send letters to their publishers announcing their intent to accomplish a reversion and asking publishers to confirm the reversion. Some publishers do not respond quickly to reversion requests, leaving copyright ownership in abeyance. Extra complications arise nowadays because some publishers claim that books should still be considered "in print" as long as the publishers are making them available through a print-on-demand service.

A third problem affecting author-publisher rights to authorize e-books arises from poor document-management practices. Some publishers, as well as some authors, do not maintain good files on all of the contracts that authorize the publication of books. Lost or misplaced contracts are especially likely for older books. Mergers and acquisitions of publishing firms, as well as the failure of some firms, in the past several decades have contributed to difficulties in locating publishing contracts from which to discern whether the author or publisher of a particular book has the right to authorize the making and selling of e-books.

A fourth problem arises from the termination of transfer rules embodied in the 1976 Act. This Act gives authors (or certain specified heirs, if the author is deceased) the right to terminate any transfer of copyright—including the assignment of all rights in their works as well as non-exclusive or exclusive licenses—after thirty-five years, as long as a notice of intent to terminate the transfer has been given between two and ten years before the effective date of termination and certain other formalities are complied with.[103] This termination right is not waivable by contract.[104] Thus, an author who assigned copyright in a book manuscript to her publisher in 1978 can in 2010 inform the publisher that in 2013 she intends to terminate the assignment and reclaim her copyright in the book. Unless the author and publisher strike a new deal or the publisher can find some defect in compliance with termination formalities, ownership of the copyright will be in abeyance for the period between the notice and the termination.[105]

It is, of course, not just authors and publishers who find it difficult to know for sure who owns the right to authorize e-books. Any third

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103. 17 U.S.C. §§ 203(a), 304(c) (2006).

104. *Id.*

105. The termination right is, moreover, quite formalistic and likely to give rise to litigation and uncertainty. *See, e.g.*, *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193, 202, 203 (2d Cir. 2008) (rejecting effort to terminate grant by descendants of John Steinbeck because of renegotiated agreement by his third wife); *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1048 (9th Cir. 2005) (rejecting effort to terminate a 1930 grant because of a renegotiated agreement in 1983).

party that might want, for example, to digitize in-copyright books for a corpus such as GBS faces the same problem.

Any one of the these four problems would be daunting, but considered together, they contribute significantly to the likelihood of high transaction costs for obtaining rights clearances to build digital library collections. These uncertainties also exacerbate the orphan-works problem, for to be certain about who owns e-book rights, one might well have to track down both the author and the publisher and get permission from both, and if the author is no longer living, one would have to track down her heirs as well. While a legislative solution to some of these problems might be possible (e.g., proposing a revenue-sharing arrangement for books published prior to a certain year after which e-book rights would have been in contemplation and should have been bargained for), it may be unlikely to occur for various reasons, including because rights allocations are generally matters of contract interpretation.

In the meantime, publishers can be expected to claim that they own e-book rights, and authors can be expected to dispute this. Some of these claims may end up in litigation, but it is an expensive and time-consuming way to resolve disputes, and few authors will have the resources to pursue such a strategy.[106]

Google set out to avoid the transaction costs of rights clearances by scanning the books and claiming its use was fair, relying in no small part on the argument that transaction costs for accomplishing rights clearances in advance on a book-by-book basis are so high that a market failure arguably exists.[107] Market failure has sometimes been invoked in support of fair-use defenses.[108] The unclarity about e-book rights might also have helped Google's fair-use defense, as it would be unreasonable for the firm to have to clear rights to scan for snippets just to be sure that the proper authorizations had been obtained.

A powerful motivator for the GBS settlement, especially for the Authors Guild and AAP, was their mutual interest in finding a way to resolve author-publisher e-book rights disputes. The Guild and AAP

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106. Some author representatives have been willing to incur the wrath of publishers by making deals with e-book sellers, such as the deal Andrew Wylie recently struck with Amazon.com on behalf of numerous prominent authors. *See, e.g.*, Alison Flood & Ed Pilkington, *Publishers Rage Against Wylie's Ebook Deal with Amazon*, GUARDIAN.CO.UK (July 23, 2010), http://www.guardian.co.uk/books/2010/jul/23/publishers-wylies-ebook-deal-amazon. However, Random House challenged Wylie's deal with Amazon and seems to have persuaded Wylie to back down. *See, e.g.*, Jeffrey A. Trachtenberg, *Amazon Loses E-Book Deal*, WALL ST. J., Aug. 25, 2010, at B1.

107. *See, e.g.*, Band, *supra* note 3, at 229.

108. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (noting that a market for licensing critical commentary or parody of copyrighted works is unlikely).

negotiators wanted to achieve a fair revenue-sharing arrangement for books whose contracts were ambiguous or missing.[109] The Authors Guild negotiators also pressed hard for a procedure that would expedite reversions of copyrights to authors.[110]

Google appears indifferent about how the author-publisher e-book disputes are resolved. As long as Google can keep a substantial share of any revenues generated from its commercialization of GBS books, it seems willing to pay a substantial share to the appropriate rights holder. Google just doesn't want to make that determination itself. In effect, the settlement proposed to free Google of any worry about who really owns the rights to authorize digitization. As long as Google was willing to throw 63 percent of the revenues over the wall to the BRR, it would have met its responsibilities.[111] It would be up to BRR to make sure that the appropriate rights holder was located and paid appropriate shares of these revenues.[112]

F. Deficient Copyright Office Records Contributed to GBS

The U.S. Copyright Office has historically maintained records of registration of copyright claims for books published in the United States, as well as records of renewals of copyrights, transfers of copyrights, restorations of copyrights, and termination of transfer notices.[113] One might expect this body of information to be of considerable assistance to anyone undertaking a search for the rights holders of particular books, as these documents are matters of public record.

There are several reasons why registration and other rights-holder data residing in the Copyright Office are not as helpful as one might expect. For one thing, registration is permissive under current law, and although there are some statutory inducements for prompt registration (e.g., eligibility for statutory damage and attorney fee awards),[114]

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109. Paul Aiken, Executive Director of the Authors Guild, explained to members of Congress that the GBS settlement had taken thirty months to negotiate in large part because the publishers and authors were negotiating these issues. *Competition and Commerce in Digital Books: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 32, 143 (2009) (statement of Paul Aiken, Executive Director, Authors Guild). Attachment A of the Amended Settlement Agreement offers a resolution of these contentious issues. *See infra* notes 204–07 and accompanying text.

110. *Competition and Commerce in Digital Books*, *supra* note 109, at 143 (statement of Paul Aiken, Executive Director, Authors Guild).

111. Amended Settlement Agreement, *supra* note 1, § 4.5, at 68.

112. *Id.* § 6.1, at 80.

113. 17 U.S.C. §§ 104A(c), 203(a)(4), 205(a), 304(c), 408–410.

114. § 412.

relatively few copyright owners register at all, let alone promptly.[115] Second, these records may be outdated, as there is no duty to notify the Copyright Office of changes in ownership (e.g., when the copyright is transferred from one person to another) or contact information. Third, the Office has been a slow and not entirely successful adopter of digital database technologies. The Office has not, for example, digitized registration data from the paper documents filed prior to its adoption of an online registration system. Manual searches of paper documents are necessary to locate this information in the Office's records. As with the author-publisher disputes over ownership of e-book rights, these limitations of the Copyright Office's records contribute to the orphan-works problem.

These limitations also make it difficult to determine which books published between 1923 and 1963 are in the public domain for failure to file a renewal document with the Copyright Office. An estimated 55 percent of books published in that thirty-year period are, in fact, public domain books; the problem is that no one knows which ones are still in-copyright and which ones are not.[116] It would be very costly for nonprofit digitizers to go to the Copyright Office to make manual searches for renewal information.[117] This information should be available online, but it is not.

When Google began GBS, it ignored the limitations of Copyright Office records because it believed that its fair-use defense would make checking Copyright Office records unnecessary. Under the settlement, however, Google is seemingly committed to establish an online database of all books in copyright and in the public domain.[118] The accuracy, completeness, and accessibility of these data remain contentious in relation to the GBS settlement.[119] Unlike the Copyright Office records, the GBS books database is a private information resource.

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115. *See, e.g.*, Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 495–96 (2004).

116. John P. Wilkin, *Bibliographic Indeterminacy and the Scale of Problems and Opportunities of "Rights" in Digital Collection Building*, RUMINATIONS, 2011, http://www.clir.org/pubs/ruminations/01wilkin/wilkin.html.

117. *See, e.g.*, Letter from Arnaud Nourry, Chief Exec. Officer, Hachette Livre SA, to The Honorable Denny Chin, Judge, S. Dist. N.Y. 10–12 (Jan. 27, 2010), *available at* http://thepublicindex.org/docs/amended_settlement/hachette.pdf.

118. Amended Settlement Agreement, *supra* note 1, § 3.1(b), at 26–27.

119. *See, e.g.*, Declaration of Pierfrancesco Attanasio at 3–4, *Authors Guild, Inc. v. Google Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Jan. 28, 2010), *available at* http://thepublicindex.org/docs/amended_settlement/Attanasio.pdf; Letter from Diana Kimpton to The Honorable Denny Chin, Judge, S. Dist. N.Y. 4–6, (Jan. 10, 2010), *available at* http://thepublicindex.org/docs/amended_settlement/kimpton.pdf.

G. Google's Risk Assessment Concerning GBS and the Settlement

When Google commenced the GBS project, the firm was not only confident of its fair-use defense, but also of its ability to moot any lawsuit filed against it for copyright infringement by individual authors or publishers because Google was prepared to remove objecting rights holders' works from the GBS corpus.[120] Google's liability risk as to any particular book was, moreover, relatively small. After all, how much financial harm could a copyright owner have suffered from Google's storage of the book on its servers for some months before it was removed from GBS or from snippet displays? Even if Google lost its fair-use defense, the actual damages to a copyright owner from scanning to index would be close to $0, and since Google was not serving ads next to the snippets from in-copyright books, no profits attributable to infringement could be awarded.[121]

There was, of course, a risk of a statutory damage award for book scanning, but the risk range per book was only $750 to $150,000.[122] Given the plausibility of Google's fair-use defense, any statutory damage award was likely to be at the lower end of the range.[123] Given the high costs of litigation, few individual rights holders were likely to sue Google.

Google's liability risks were even lower as to owners of rights in chapters from edited volumes or other components of books (such as forewords, afterwords, photographs, or illustrations) because these authors were unlikely to have registered their claims of copyright with the U.S. Copyright Office within three months of publication. They would thus be ineligible for awards of attorney fees or statutory damages. These copyright owners were even less likely than book rights holders to bring an infringement suit against Google for GBS-related acts.

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120. *See* KATE M. MANUEL, CONG. RESEARCH SERV., THE GOOGLE LIBRARY PROJECT: IS DIGITIZATION FOR PURPOSES OF ONLINE INDEXING FAIR USE UNDER COPYRIGHT LAW? 2 (2009) (noting Google's defense against infringement claims based on the right of authors and publishers to "opt out" of GBS).

121. 17 U.S.C. § 504(b) (2006). U.S. copyright law allows recovery of both actual damages and any profits the defendant made that are attributable to infringement. *Id.*

122. § 504(c). This remedy is an alternative to an award of actual damages and defendant profits. § 504(a). By continuing to scan books after the Authors Guild charged it with infringement, Google increased somewhat the risk that it would be deemed a willful infringer.

123. Elsewhere I have argued that statutory damage awards should be toward the minimum end of the scale for defendants with plausible fair-use defenses. *See* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 500 (2009).

The liability risk was, of course, higher if a major trade publisher, such as McGraw Hill or Macmillan, sued Google for copyright infringement in their books.[124] Yet, Google may have viewed this risk as relatively modest because *Random House* suggested that trade publishers probably did not own the right to control new uses such as digitization and e-books. Actual damages for scanning books to make indexes and display snippets would, as noted above, still be near zero, and there was little likelihood of profits attributable to infringement, even if Google's fair-use defense failed. Google had also formed partnerships with major trade publishers, including the publishers who sued it in the fall of 2005,[125] and serious litigation against one's partners is unusual. Combined with Google's resources, this may have made the liability risk seem acceptable.

Foreign rights holders might not like the GBS project, but because Google was only scanning books in the United States and copyright laws are territorially bounded, Google may have regarded the risk of foreign copyright liability for book scanning to be minimal.[126] It may have believed that the display of snippets to non-U.S. users of its search engine would be protected by short quotation privileges in foreign copyright laws.[127]

The biggest risk for Google was that someone would file a class action lawsuit to challenge GBS,[128] as indeed the Authors Guild did. Google was confident in its fair-use defense; yet it may have thought

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124. McGraw Hill and Macmillan may have decided to sue Google for infringement in part because of the risk that the Authors Guild might try to use its class action lawsuit against Google to get a ruling that would extend *Random House* to hold that authors, not publishers, owned the rights to authorize digitization of books and the right to make and sell e-books. However, they may also have been genuinely outraged by Google's systematic scanning of in-copyright books from research-library collections.

125. Toobin, *supra* note 19, at 32.

126. However, one French court has ruled that Google's scanning of French rights holders' books in the United States infringes French copyrights. *See* Whitney, *supra* note 24.

127. Google persuaded a German court that GBS snippet display did not infringe German copyrights; the same court rejected the claim that the scanning of books in the United States infringed German copyrights. *See, e.g.*, David Drummond, *Germany and the Google Books Library Project*, THE OFFICIAL GOOGLE BLOG (June 28, 2006, 10:45 AM), http://googleblog.blogspot.com/2006/06/germany-and-google-books-library.html.

128. Rule 23(a) of the Federal Rules of Civil Procedure sets forth a set of requirements for maintaining a lawsuit as a class action: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Part III *infra* assesses at some length whether these criteria could be met in the *Authors Guild* case.

that it could defeat a class action certification motion given the diversity of interests and legal positions of authors and publishers on the scanning-to-index-and-provide-snippets issue.[129] A substantial percentage of books in the university research libraries scanned by Google are books written by scholars for scholarly audiences.[130] Academic authors of such books are far more likely than members of the Authors Guild to think that scanning to provide snippets is fair use and more likely to want to make their out-of-print books available on an open-access basis.[131] A professional writer such as Herbert Mitgang, the Guild's eighty-nine-year-old lead plaintiff, might find it difficult to persuade a court that his claim that scanning books for snippet-display purposes is copyright infringement and is typical of the legal perspectives of the majority of authors of books in the university libraries. Class certification might also be difficult because of the uncertainty about who owns the rights to authorize the digitization of books.[132] Google might also challenge a class certification motion insofar as class counsel seek to include orphan-book rights holders in the class, as it is impossible to know what interests such persons would have.[133]

Yet, once the Authors Guild actually initiated a class action lawsuit against Google, and it was clear it would not be summarily

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129. Google had some experience with fending off class action lawsuits by challenging the certifiability of a plaintiff class because of diverse interests and legal perspectives. *See Vulcan Golf, LLC v. Google Inc.*, 254 F.R.D. 521, 524–27 (N.D. Ill. 2008) (denying certification of a class of trademark owners because the legal claims of the named plaintiffs were not typical of members of the proposed class, some of whom would have thought the challenged action was fair use).

130. One study has analyzed the collections of several of Google's research library partners. *See, e.g.*, Brian Lavoie, Lynn Silipigni Connaway & Lorcan Dempsey, *Anatomy of Aggregate Collections: The Example of Google Print for Libraries*, 11 D-LIB MAG., Sept. 2005, http://www.dlib.org/dlib/september05/lavoie/09lavoie.html.

131. *See, e.g.*, Letter from Pamela Samuelson, Law Professor, Univ. of Cal., Berkeley, Sch. of Law to The Honorable Denny Chin, Judge, S. Dist. N.Y. 2–3, (Sept. 3, 2009), *available at* http://thepublicindex.org/docs/letters/samuelson.pdf (writing on behalf of academic authors and arguing that academic authors are more likely than Authors Guild members to support scanning-for-snippets as fair use). The concerns of academic authors about adequacy of representation resonated with Judge Chin in his decision rejecting the settlement. *See Authors Guild v. Google, Inc.*, No. 05-CV-8136-DC, slip op. at 1, 28–29 (S.D.N.Y. Mar. 22, 2011).

132. *See* Letter from Pamela Samuelson to The Honorable Denny Chin, *supra* note 131, at 2–3; *supra* text accompanying note 131.

133. The Internet Archive argued that orphan-works owners should be excluded from the GBS settlement class because their interests are unknowable. *See* Memorandum of Amicus Curiae The Internet Archive in Opposition to Settlement Agreement, *Authors Guild, Inc. v. Google Inc.*, No. 05-CV-08136-DC (S.D.N.Y. Sept. 8, 2009), *available at* http://thepublicindex.org/docs/letters/internet_archive.pdf.

dismissed,[134] Google had some reason to fear that it was betting the firm on its fair-use defense. If the goal for GBS was to build a corpus of fifty million books,[135] as one of Google's library partners has maintained—the overwhelming majority of which are in copyright—its potential statutory damage exposure could run into the billions if a judge certifies a class of rights holders.[136] While Google would almost certainly have challenged the consistency of any such award with the Supreme Court's due process jurisprudence limiting punitive damage awards,[137] challenges of this sort have thus far met with mixed results.[138] The *Authors Guild* complaint did request an award of statutory damages.[139]

Google also had some reason to worry that if the class was certified and its fair-use defense failed, it could be enjoined from using that part of the GBS corpus consisting of in-copyright books for which the firm had not obtained rights holder permissions.[140] It was also conceivable that Google could be ordered to destroy that part of the corpus that contained infringing books, which would render GBS a very unwise investment.[141]

Did Google contemplate early on that the complaints filed by the Authors Guild and the trade publishers were an opening gambit for a negotiation that would eventually end in a settlement? No Google official has admitted this, but it is hardly a secret that class action lawsuits settle far more often than they are fully litigated.[142]

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134. Although Google filed an answer to both complaints, it did not file a motion to dismiss either lawsuit. All litigation documents and orders in the *Authors Guild* case can be found at THE PUBLICINDEX, http://thepublicindex.org/documents/procedural (last visited Mar. 7, 2011).

135. Letter from Paul Courant to The Honorable Denny Chin, *supra* note 16, at 1.

136. One commentator estimated Google's potential exposure in the *Authors Guild* case at $3.6 trillion. Band, *supra* note 3, at 229.

137. *See, e.g.*, Samuelson & Wheatland, *supra* note 123, at 464–74 (arguing that grossly excessive statutory damage awards in copyright cases are unconstitutional).

138. *Id.* at 474–91 (discussing the mixed case law).

139. Class Action Complaint and Jury Trial Demand at 13, *Author's Guild, Inc. v. Google Inc.*, No. 05-CV-8136 (S.D.N.Y. Sept. 20, 2005), *available at* http://thepublicindex.org/docs/complaint/authors.pdf.

140. 17 U.S.C. § 502 (2006).

141. § 503(b).

142. A very substantial percentage of class action lawsuits end in settlements. *See, e.g.*, Thomas Olson, *Knowledge Makes It Easier to Get the Most from Class-Action Lawsuits*, PITTSBURGH TRIB.-REV., Aug. 29, 2010, http://www.pittsburghlive.com/x/pittsburghtrib/business/s_696919.html. One source reports that: "Less than 1 percent of filed class actions [in the United States] proceed to trial, in part due to extensive pretrial fact discovery and in part to avoid the risk of a large win or loss." *Class Action/Group Litigation Laws Worldwide*, INTERNATIONAL JUSTICE (May 2008),

Google would almost certainly have vigorously fought certification of the litigation class identified in the Authors Guild complaint had a certification motion been made.[143] However, once settlement negotiations began—as they soon did—Google became interested in having the broadest possible settlement class, so that it could bind as many copyright owners as possible to the new regime that the settlement would establish.[144] The class defined in the October 2008 proposed settlement agreement was indeed breathtakingly vast, as it included every owner of a U.S. copyright interest in one or more books in the world, including foreign rights holders whose books were not commercially available in the United States but whose books nonetheless enjoyed U.S. copyright protection under international treaties.[145]

H. Other Factors Contributed to GBS and the Settlement

1. GOOGLE'S MOTIVATIONS

Google undertook its GBS initiative not only—and perhaps not mainly—because it wanted to supply users of its search engine with snippets of texts from the many millions of books it was scanning; it also wanted to make what the settlement calls "[n]on-[d]isplay" uses of

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http://www.internationaljustice.ws/northamerica.html; *see also* THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL COURT DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 11 (1996) (finding that only 4 percent of class actions proceeded to trial).

143. The Authors Guild complaint was initially brought on behalf of a class of persons or entities owning copyrights in literary works contained in the University of Michigan library. Class Action Complaint and Jury Trial Demand, *supra* note 139, ¶ 20. Class certification is supposed to occur at an early stage of class action litigation. *See* FED. R. CIV. P. 23(c)(1)(A). The Authors Guild complaint was amended in July 2006, more than ten months after the initial complaint, to broaden the class to persons or entities owning copyrights in works in the University of Michigan library. *See* First Amended Class Action Complaint, *Authors Guild, Inc. v. Google Inc.*, No. 05-CV-8136-JES (S.D.N.Y. July 24, 2006), *available at* http://thepublicindex.org/docs/complaint/authors_amended.pdf. At this point, settlement negotiations were well underway.

144. *See, e.g.*, John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 851–52 (1995) (arguing that class actions have become shields for defendants); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 345 ("[W]hile the class action device . . . may have appeared as a 'sword' to break through the litigation thicket, it soon became apparent that a class action could serve defendants as a most welcome shield against future litigation . . . .").

145. *See* Settlement Agreement, *supra* note 1, §§ 1.14, 1.16, 1.28, 1.38, 1.120, 1.122, 1.123, 1.142, at 3, 4, 5–6, 15, 16, 17–18 (defining the class and explaining why it included virtually all foreign rights holders in books).

the books' contents,[146] which include experiments aimed at improving its search technologies. As one Google engineer observed, "the very worst [search] algorithm at 10 million words is better than the very best algorithm at 1 million words."[147] The best way to improve search technologies, the engineer pointed out, is to get more data. Books from the collections of major research libraries are dense with data, and the more books Google can scan from these collections, the better its search techniques are likely to become.[148] Although the *Authors Guild* lawsuit did not assert that non-display uses of books in the GBS corpus was copyright infringement, Google would almost certainly have argued that non-display uses are fair uses if the Guild amended the complaint to add them. A settlement of the Guild's lawsuit was attractive to Google if the Guild and AAP would agree, as indeed they did, to allow Google to make uncompensated non-display uses of GBS books.

Another Google motivation for settlement was that it could generate revenues from which to recoup the costs of the GBS initiative. Google is an amazingly innovative and successful company, but thus far, it has been, as Steve Ballmer has put the point, "a one-trick pony," in that it makes the overwhelming majority of its revenues from search-related advertising.[149] Eric Schmidt, Google's CEO, has said that he likes this pony very much, but he has also been cajoling Google staff to develop new revenue sources.[150] Approval of the settlement would have allowed Google to keep 37 percent of any revenues generated from selling individual books through the consumer purchase model, from licensing the ISD to universities and other institutions, from certain ads served in response to user queries, and from any other commercializations that it and the BRR might agree upon in the future.[151]

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146. Non-display uses are defined as "uses that do not display Expression from Digital Copies of Books or Inserts to the public." Amended Settlement Agreement, *supra* note 1, § 1.94, at 15.

147. Objection of Yahoo! Inc. to Final Approval of the Proposed Class Action Settlement at 25, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136 (DC) (S.D.N.Y. Sept. 8, 2009), http://thepublicindex.org/docs/letters/yahoo.pdf [hereinafter Objection of Yahoo!] (quoting a Google engineer).

148. The GBS corpus had expanded to more than fifteen million volumes as of October 2010. *See* James Crawford, *On the Future of Books*, INSIDE GOOGLE BOOKS (Oct. 14, 2010, 7:26 PM), http://booksearch.blogspot.com/2010/10/on-future-of-books.html.

149. *See, e.g.*, KEN AULETTA, GOOGLED: THE END OF THE WORLD AS WE KNOW IT 204 (2009) (quoting Ballmer).

150. *Id.* at 204–05.

151. *See* Amended Settlement Agreement, *supra* note 1, §§ 2.1(a) at 23–24, 4.7 at 73; *see also id.*, attachment N, at 4. Under the settlement, Google would not

Google may also have hoped to reap additional revenues from GBS by integrating it with its search engine and with other products and services it has been developing. For a while Google was promoting its Wave technology as "a real-time communication and collaboration platform that incorporates several types of web technologies, including email, instant messaging (IM), wiki, online documents, and gadgets."[152] A wave could be both a conversation and a document where "[p]eople can discuss and work together with richly formatted text, photos, videos, maps, and more."[153] Google may have hoped to integrate GBS with a social networking platform to compete with Facebook; this would give Google a chance to induce its current user base to spend more time in Google-land, which, in turn, would enhance opportunities for monetizing that additional user attention.[154] Google might, for instance, have planned to sell more books by making a special offer appear from the Google eBook store every time a user mentioned a book on such a platform.

2. TRADE PUBLISHER MOTIVATIONS

The trade publisher plaintiffs seem to have had three main motivations to settle their lawsuit against Google. One was to avert the risk that Google's fair-use defense would succeed; the settlement would create a precedent of sorts that might discourage other scanning projects. While a settlement would obviously not set a formal legal precedent, the publishers would view the settlement as an implicit admission by Google that it needed to license the right to scan books.

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have been obliged to share revenues with BRR for every ad served up when GBS book contents were displayed, but only for those that fell within the definition of certain advertising uses of GBS contents. The Amended Settlement Agreement provided that: "Advertising on general search results pages in which the search is performed over multiple Books and/or over other content such as web pages in response to a user query is not considered an 'Advertising Use,' even if a single Book is the sole search result of a given search on a search results page." *Id.* § 3.14, 49–50. Only ads displayed next to preview uses of the books would have given rise to an obligation to share ad revenues with rights holders. *Id.*

152. Andrés Ferraté, *An Introduction to Google Wave - Google Wave: Up and Running*, O'REILLY, http://oreilly.com/web-development/excerpts/9780596806002/google-wave-intro.html (last visited Mar. 16, 2011).

153. *Meet Google Wave*, GOOGLE WAVE LABS, http://wave.google.com/about.html (last accessed Mar. 16, 2011). Google has discontinued Wave, but remains interested in expanding into social networking. Georgina Swann, *Google Wave Slayed by Facebook and Twitter*, PC WORLD, Aug. 6, 2010, http://www.pcworld.com/article/202722/google_wave_slayed_by_facebook_and_twitter.html.

154. *See, e.g.*, Sonja Ryst, *Google Wants in on the Social Networking Game*, WASH. POST, Aug. 29, 2010, at G01 (discussing a number of ways in which Google has been or seems likely to compete with Facebook's social network).

The settlement might also tip the scales against a fair-use defense in a future case challenging book scanning.[155]

A second significant publisher motivation to settle the *Authors Guild* litigation was the opportunity to generate new revenues from out-of-print books.[156] The GBS settlement would, in effect, have conferred on Google a de facto monopoly over tens of millions of out-of-print books, which Google intended to monetize through ISD subscriptions, likely to be priced at profit-maximizing levels.[157] Although the publishers who negotiated the GBS settlement may not have intended to make their inventory of out-of-print books available for ISDs,[158] they made sure they would have a role in setting the prices of the ISD to different kinds of institutions to ensure that the revenue-enhancement goal for GBS books would be achieved.[159] The Antitrust Division of the U.S. Department of Justice (DOJ) expressed concern about the

155. The Authors Guild and the publishers would almost certainly emphasize Google's capitulation in any subsequent lawsuit. In addition, the next scanner's fair-use defense might be deemed unnecessary because the public could already use GBS books for free through public libraries and some access terminals at higher education institutions, whereas Google could claim in the *Authors Guild* case that the out-of-print books it scanned for GBS were languishing away on library shelves and that GBS was giving them a new life by serving up snippets. A second scanning project might, depending on its scope, be viewed as potentially harmful to the market for the GBS ISD. A court might, moreover, perceive a "snippet" defense as a pretext aimed at getting a comparable settlement to compete with GBS.

156. There is, of course, a secondary market for used books that are out of print. However, owing to copyright's first sale doctrine, revenues generated from used books do not flow to rights holders. 17 U.S.C. § 109(a) (2006).

157. *See* Statement of Interest of the United States of America Regarding Proposed Class Settlement at 23–26, *Authors Guild v. Google Inc.,* No. 05-CV-8136-DC (S.D.N.Y. Sept. 18, 2009) [hereinafter Statement of Interest I], *available at* http://www.justice.gov/atr/cases/f250100/250180.pdf (noting de facto exclusivity). Many concerns have been voiced about the potential for excessive pricing of ISD subscriptions. *See, e.g.*, Samuelson, *supra* note 3, at 1333–41 (discussing the risks of price gouging ISD prices if the GBS settlement is approved). Judge Chin heeded the concerns about a de facto monopoly in his decision rejecting the settlement. *Authors Guild v. Google, Inc.*, No. 05-CV-8136-DC, slip op. at 36 (S.D.N.Y. Mar. 22, 2011).

158. *See* Statement of Interest I, *supra* note 157, at 10. *See also* Statement Advising Client to Opt Out of Settlement, William Morris Endeavor Entertainment 1, *available at* http://thepublicindex.org/docs/commentary/wme.pdf [hereinafter William Morris Endeavor Entertainment Statement] ("Few if any major publishers currently intend to make their in print books available for sale through the Settlement Program . . . . It appears that most major publishers will not allow their out of print books to be sold through the Settlement Program either.").

159. Half of the Board of Directors of the BRR was to be made up of representatives from the publishing industry. *See* Amended Settlement Agreement, *supra* note 1, § 6.2(b)(ii), at 82.

settlement because it appeared to facilitate cartel pricing of books.[160] This may have been the publishers' intent.[161]

A third motivation for publishers in settling the lawsuit with Google may have been to get a technology-savvy partner that could help them figure out how to monetize e-books in a way that would protect such books against "Napsterization."[162] Trade publishers have been slow to adopt new e-commerce business models, such as sales of e-books "in the cloud."[163] Google has demonstrated not only a high capacity for innovation, but also a talent for monetizing a resource (i.e., search) that was once thought unpromising as a business.[164] As Amazon.com emerged as a dominant seller of e-books, publishers welcomed competition from firms such as Apple and Google, which, ironically enough, was likely to lead to higher prices for e-books.[165]

3. AUTHORS GUILD MOTIVATIONS

The Authors Guild, like the publishers, wanted to settle the lawsuit against Google to set a kind of precedent on the fair-use issue and to generate new revenue streams from Google's commercialization of out-of-print books. However, the Guild and its lawyers may have some motivations to settle the lawsuit that differ from the publishers'

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160. Statement of Interest I, *supra* note 157, at 25–26. Commentators have differed in their assessment of the antitrust issues posed by the GBS settlement. *See, e.g.*, Elhauge, *supra* note 3; Picker, *supra* note 3.

161. The publishers may also have been motivated to settle by the prospect of a windfall payout for those who registered with the BRR for at least some of their out-of-print books. Under the initial GBS deal, registered rights holders would have been eligible to share in revenues BRR collected from Google that were owed to rights holders of orphan books and others who failed to register with BRR during the first five years of business under the settlement. *See* Settlement Agreement, *supra* note 1, § 6.3(a), at 66. DOJ challenged this aspect of the settlement agreement as posing an intra-class conflict. Registered rights holders would have little incentive to search hard for unregistered rights holders if they stood to benefit from the failure of the others to claim their books. *See* Statement of Interest I, *supra* note 157, at 9–10. Publishers no longer have this motivation to sign up with BRR, as the amended settlement omitted this windfall provision. *See infra* notes 212–17 and accompanying text.

162. *See, e.g.*, Randall Stross, *Will Books Be Napsterized?*, N.Y. TIMES, Oct. 4, 2009, at BU1.

163. The consumer-purchase model envisioned by the settlement was to involve purchasing access to books stored on Google's servers, rather than downloaded to the consumers' devices, from which they might be vulnerable to the stripping off of technical protections that publishers hope will fend off Napsterization. For a discussion of the consumer-purchase model, see, for example, Samuelson, *supra* note 3, at 1348–51.

164. *See* AULETTA, *supra* note 149, at 38–45.

165. *See, e.g.*, Motoku Rich, *Publishers Win a Bout in E-Book Price Fight*, N.Y. TIMES, Feb. 8, 2010, http://www.nytimes.com/2010/02/09/books/09google.html.

motivations. For one thing, the Guild lacks financial resources with which to pursue full-dress litigation against Google. Its lawyers took the case on a contingency fee basis. These lawyers will only get paid if the case settles or they win the class action lawsuit, an outcome that would be at best many years away and very expensive in the meantime. Thus, a nontrivial inducement to settle rather than litigate for the Guild and its lawyers was the $30 million the latter were slated to receive if the GBS settlement was approved.[166]

The Guild may also have hoped that the prestige of winning a substantial settlement from Google would help it to attract more authors to become members of the Guild. Insofar as the Guild could persuade the copyright community that its perception that the GBS deal with Google was really good for authors, the settlement might have raised the Guild's prestige within that community as well. This prestige might also have translated into more clout with publishers the next time the Guild raised significant questions about the consistency of publisher practices with copyright law and norms.

In addition, the Guild leadership was excited by the chance to participate in the establishment of the BRR as a clearinghouse for licensing books to Google and possibly to other entities, from which new revenue streams would flow to authors.[167] Publishers have less interest in the BRR than the Guild because most were already active members of the Google Partner Program (GPP) through which they could tailor deals for their books. Guild staff have been actively engaged in planning for the operations of the BRR and believe the BRR will be a boon to the authorial community.[168]

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166. The lawyers representing the trade publisher plaintiffs, unlike the Guild's lawyers, were not operating on a contingency fee basis, but this put pressure on the publishers' pocketbooks, which was another motivation for them to settle. The trade publisher plaintiffs' lawyers now represent the Publisher Subclass and would have gotten $15.5 million if the GBS settlement had been approved. Amended Settlement Agreement, *supra* note 1, attachment I at 27. The total amount that would have been paid to class counsel in the *Authors Guild* case if the settlement had been approved, interestingly enough, is half a million dollars more than the funds Google planned to set aside to compensate all of the copyright owners whose books Google has scanned for the GBS initiative. *Id.* §§ 2.1(b), 5.5.

167. *See, e.g.*, *11/13/09 - Amended Settlement Filed in* Authors Guild v. Google (Nov. 13, 2009), THE AUTHORS GUILD, http://www.authorsguild.org/advocacy/articles/amended-settlement-filed-in-authors-guild.html (describing additional and unchanged benefits to authors in the amended settlement).

168. Declaration of Paul Aiken in Support of Plaintiffs' Motion for Final Approval of Amended Settlement Agreement at 11–13, *Authors Guild, Inc. v. Google Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Feb. 11, 2010), *available at* http://thepublicindex.org/docs/amended_settlement/Aiken_declaration.pdf (describing the Book Rights Registry and the Guild's role in governing and developing it).

Finally, the Guild wanted a settlement to resolve the e-book rights dispute with publishers so that authors would receive at least 50 percent of the revenues from GBS books and even more for older books.[169] Without the GBS settlement, chances were high that publishers would assert they owned e-book rights and put authors to the test of litigating the issue on a case-by-case basis, which most would not do. The Guild also wanted to establish a procedure to ensure that authors would be able to enjoy their reversion rights.[170]

4. THE ROLE OF GOOGLE'S LIBRARY PARTNERS

Even though the litigants had good reasons to want to settle the lawsuit, the GBS deal could not have happened without the assent of Google's library partners. The willingness of these libraries to become customers for the ISD meant that the new commercial enterprise envisioned by the settling parties could get off the ground. The libraries' main motivation in the settlement negotiations was to get much greater access to book contents than the snippets that a successful fair-use defense would provide.[171] The libraries were also keen on getting permission to make uses of the LDCs obtained from Google.

The libraries did not, however, have all that much bargaining power in the negotiations. This was partly because they were brought in to the negotiations only after the overall framework for the settlement was already in place. They could thus only negotiate on the edges. The libraries' bargaining power was also lessened by the nondisclosure agreements (NDAs) on which Google insisted with each library that forbade them from discussing terms amongst themselves in relation to Google or the settling parties.[172]

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169. *Id.* at 8–9.

170. *Id.* at 9.

171. *See, e.g.*, Amended Settlement Agreement, *supra* note 1, § 4.1(a)(i), at 50–51. The libraries insisted on the dual objectives of the settlement as including a commitment to "the realization of broad access . . . by the public." *Id.* at 51. The libraries also insisted on the "Coupling Requirement," whereby if a rights holder wanted its book to be available for the consumer-purchase model, it also had to be willing to make it available through the ISD. *Id.* § 3.5(b)(iii), at 37–38. They also wanted some checks and balances on Google's discretion to exclude books from the corpus for editorial as well as non-editorial purposes. *Id.* § 3.7(e), at 44–45.

172. *Session Four: The Google Books Settlement and the Future of Information Access*, UC BERKELEY SCHOOL OF INFORMATION, at 1:31:18 (Aug. 28, 2009) [hereinafter *Session Four: Google Book Settlement Information Access Conference*], http://www.ischool.berkeley.edu/newsandevents/events/20090828googlebooksconference (statement of Dan Greenstein, Vice Provost, UC Office of the President) (mentioning non-disclosure agreements limiting what library representatives could say about Google Book Search negotiations).

II. HOW IS THE GBS SETTLEMENT LIKE COPYRIGHT REFORM?

There are numerous respects in which the GBS settlement, if approved, would have accomplished changes that would be tantamount to legislative reform.[173] This is because the settlement aimed to change some substantive default rules of copyright law and because it would have had substantial spillover effects for third parties not represented in the settlement negotiations. The most obvious example is the solution the settlement would have provided to the orphan-books problem.[174] However, the legislative character of the settlement is apparent from the several other licenses it would have granted to Google: to scan all in-copyright books within the settlement, to make non-display uses of them, to give LDCs of these books to library partners, to establish host sites at which non-consumptive research could be carried out, and to commercialize out-of-print books in the corpus.[175] These licenses would have been compulsory in the sense that Google was planning to make no effort to get actual consent from class members, who instead would have been deemed to have consented by virtue of their membership in a class whose counsel negotiated the settlement, supposedly on their behalf.[176] Decisions about whether to grant compulsory licenses have traditionally been, as the Register of Copyrights has observed, "the domain of Congress," which is a forum in which the merits of the grant could be "weighed openly and deliberately, and with a clear sense of both the beneficiaries and the public objective."[177] Congress has been reluctant to grant compulsory licenses without evidence of market failure that can only be cured by such a license, and even then the licenses tend to be carefully tailored to address the market failure as

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173. Other aspects of the GBS settlement that have a legislative character include the security provisions of the ASA, appendix D, and the provisions setting forth the procedures for determining the in-print or out-of-print status as well as the in-copyright or public domain status of books. *See* Amended Settlement Agreement, *supra* note 1, §§ 3.2–3.6, at 28, attachment E, at 1.

174. *See, e.g.*, *Competition and Commerce in Digital Books*, *supra* note 109, at 71 (prepared statement of Marybeth Peters, Register of Copyrights); *see also* Grimmelmann, *supra* note 3; Picker, *supra* note 3. The settlement's solution to the orphan-works problem is discussed *infra* notes 209–15 and accompanying text.

175. *See infra* notes 259–60 and accompanying text.

176. Although Google was willing to incur substantial costs to scan millions of books, to make indexes of their contents, to develop and refine search capabilities for finding and serving up snippets, and to litigate its fair-use claim, it was not willing to seek advance permission, on a book-by-book basis, for every in-copyright book merely to serve snippets. That would have taken too long and cost too much to allow an effective market to form. *See supra* note 54 and accompanying text. For orphan books, an advance-permission market would, moreover, be impossible.

177. *Competition and Commerce in Digital Books*, *supra* note 109, at 68 (prepared statement of Marybeth Peters, Register of Copyrights).

well as concerns of various stakeholders who participated in the legislative deliberations.[178]

The GBS settlement had a legislative character because of the hundreds of millions of people it would have affected. This obviously included many millions of copyright owners, not only in the United States but worldwide, whom the settlement would bind to a regime that would have changed the most fundamental default rule of copyright law: the requirement that prospective users of works get advance permission from rights holders before making uses that implicate the owners' exclusive rights.[179] The GBS settlement would, however, also have affected millions of third parties who were not members of the class and whose interests were not represented in the settlement negotiations, including millions of future GBS users.[180]

A. The Settlement Would Give Google a License to Scan, Store, and Make Non-Display Uses of All Books Within the Settlement

Approval of the GBS settlement would have given Google a license to scan all books covered by the settlement, to store these books on its servers, and to make non-display uses of their contents.[181] Because the term "non-display uses" was broadly defined,[182] this license would have permitted some uses of books that Google has not yet disclosed, and likely some that the settling parties had not yet imagined. This term may also encompass non-consumptive research (e.g., searching the corpus of books to trace the origins of particular words or phrases and discern how their meaning evolved over time), although the agreement also explicitly authorized Google to license two host sites to allow such research on all books in the GBS corpus.[183]

Congress could, of course, have authorized such a license through legislation. Had it done so, proponents of book-scanning and digital-library projects would have hailed this as copyright reform. Yet, the

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178. *Id.* at 70. Compulsory licenses in copyright are, in fact, relatively rare. *See* 17 U.S.C. §§ 114–115, 119 (2006).

179. *Competition and Commerce in Digital Books*, *supra* note 109, at 67–68 (prepared statement of Marybeth Peters, Register of Copyrights).

180. *See infra* notes 380–83 and accompanying text.

181. *See* Amended Settlement Agreement, *supra* note 1, § 2.2, at 20–21.

182. Non-display uses include "display of bibliographic information, full-text indexing without display of Expression (such as listing the number or location of search matches), geographic indexing of Books, algorithmic listings of key terms for chapters of Books, and internal research and development using Digital Copies." *Id.*

183. *Id.* § 7.2(d), at 99. Under the settlement, all in-copyright books would have been available for non-consumptive research unless the rights holder expressly directed their exclusion from this use.

Authors Guild and the AAP would likely have opposed such legislation, and without their support it is questionable whether Congress would enact a safe harbor for scanning in-copyright books for non-display purposes. It seems, moreover, highly unlikely that Congress would adopt such a safe harbor only for Google. The Authors Guild and the AAP may have perceived the GBS settlement as a copyright reform measure because it seemed to establish, even if only implicitly, that the digitization of in-copyright books for any purpose requires a license.

Implicit in the non-display-use provisions of the settlement, for which Google would have provided no compensation to rights holders, was the premise that that the only legitimate interest copyright owners have in their books is the right to control the display of expression from the books to members of the public.[184] That premise may well be sound, but it is not obviously so. Some class members objected to the settlement for its failure to provide compensation for non-display uses of in-copyright works.[185]

Interestingly enough, neither the Authors Guild nor the trade publishers' complaints mentioned Google's non-display uses of books. During settlement negotiations, the plaintiffs tried to negotiate for compensation for non-display uses, but Google let it be known that there would be no deal unless it were free to make these uses without compensation.[186]

Non-display uses of books was of important commercial significance for Google. Two of Google's key competitors in the search engine business, Yahoo! and Microsoft, objected to the non-display-use provisions of the settlement because the non-display-use license confers upon Google a competitive advantage in the search market that they deem unfair.[187] Studies have shown that users' satisfaction levels with

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184. *Cf.* Sag, *supra* note 56, at 1609.

185. *See, e.g.*, Guthrie Objections, *supra* note 2, at 9–10.

186. Declaration of Michael J. Boni in Support of Final Settlement Approval and Application of Counsel for the Author Sub-Class for Award of Fees and Reimbursement of Costs at 3, *Authors Guild, Inc. v. Google Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Feb. 11, 2011), *available at* http://thepublicindex.org/docs/amended_settlement/Boni_declaration.pdf.

187. *See, e.g.*, Objections of Microsoft Corporation to Proposed Amended Settlement and Certification of Proposed Settlement Class and Sub-Classes, *Authors Guild, Inc. v. Google Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Jan. 28, 2010), *available at* http://thepublicindex.org/docs/amended_settlement/Microsoft_Objection.pdf; Objection of Yahoo, *supra* note 147, at 25. Google executives have dismissed competitors' concerns by claiming that any firm could do what Google did. *See* Sergey Brin, Op-Ed., *A Library to Last Forever*, N.Y. TIMES, Oct. 8, 2009, http://www.nytimes.com/2009/10/09/opinion/09brin.html. Yet, DOJ has recognized that it would be unsound policy to encourage a firm such as Microsoft to start scanning in-copyright books in the hope that the same or a new set of plaintiffs would file a class action lawsuit to challenge scanning and non-display uses that would then settle on

search engines—and hence their loyalty to and persistent use of them—are affected by how well the engines respond to so-called "tail" queries, that is, queries on esoteric topics (e.g., seeking information about a particular bird native to the Amazon River delta, the anatomical structure of whales, or import and export data for Lithuania in the nineteenth century) that many users of search engines occasionally make.[188] For common search queries (e.g., movie schedules for a particular theatre, where to find a particular model of Nikon camera, hotels available in Bermuda), virtually any search engine is as good as the others. Therefore, Google's ability to respond to tail queries, and thus satisfy its users, will be vastly improved by its ability to search through the GBS book corpus.[189]

Google has been making non-display uses of the now fifteen million books in the GBS corpus during the pendency of the settlement approval, perhaps because of its confidence either that the settlement will be approved or that these uses are fair.[190] Among the books of which non-display uses are being made are many that are not covered by the settlement (e.g., books whose rights holders have opted out of the settlement, and books whose foreign rights holders are excluded from the amended settlement).

The compulsory license that the settlement would have given Google to scan, store, and make non-display uses of GBS books without obtaining advance permission from rights holders can be viewed as an effort to achieve copyright reform through private ordering, that is, through negotiation of a settlement with the *Authors Guild* plaintiffs rather than through legislative action.

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similar terms to the GBS deal. *See* Statement of Interest I, *supra* note 157, at 23–24. The only legitimate way that Google's competitors could realistically get a comparable license to make non-display uses of in-copyright books would be through legislation. In ruling against the settlement, Judge Chin observed that "the ASA would arguably give Google control over the search market." *Authors Guild v. Google, Inc.*, No. 05-CV-8136-DC, slip op. at 1, 37 (S.D.N.Y. Mar. 22, 2011).

188. *See, e.g.*, Supplemental Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement Between the Authors Guild, Inc., Association of American Publishers, Inc., et al., and Google Inc. at 17–18, *Authors Guild, Inc. v. Google, Inc.*, Case No. 05-CV-8136-DC (S.D.N.Y. Jan. 28, 2010), *available at* http://thepublicindex.org/docs/amended_settlement/Open_BookAlliance.pdf [hereinafter OBA Supplemental Memorandum].

189. *Id.*

190. *Id.* at 15.

B. The Settlement Would Give Google a License to Commercialize Out-of-Print Books

The single most significant reform of default copyright rules that would have flowed from approval of the GBS settlement was the license the agreement would have given Google to commercialize all out-of-print books within the settlement.[191] The settlement would, in essence, grant Google a compulsory license because although rights holders could say no, they would have had to come forward to do so; and in the meantime, Google would have had the right to commercialize their books.[192]

On several occasions, Congress has authorized compulsory licenses to make use of copyrighted content to facilitate the development of new markets or to overcome market failure.[193] Amazon.com is among the opponents of the GBS settlement who vigorously asserted that the grant of a compulsory license to commercialize out-of-print but in-copyright books is an action that can lawfully be accomplished only through legislation,[194] not through the settlement of a class action lawsuit.

The settlement also seemed legislative in setting forth the procedure by which Google would determine whether a book is out of print and thus subject to the default commercialization license.[195] Google was obliged to consult various data sources to determine whether particular books were commercially available or not; if they were not, the books would have been deemed out-of-print and available for commercialization.[196] A rights holder's only recourse if he or she contested Google's determination would have been to initiate a compulsory arbitration under the aegis of the BRR.[197]

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191. Amended Settlement Agreement, *supra* note 1, § 2.1(a), at 23–24, § 3.3(a)-(c), at 33–34.

192. Rights holders could also sign up for the GPP and thereby be freed from default settlement license terms. Approval of the GBS settlement would, in effect, have created an extended collective license akin to those adopted in some Nordic countries. *See, e.g.*, Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 283, 290–96 (Daniel Gervais ed., 2d ed. 2010).

193. *See* 17 U.S.C. §§ 114–15, 119 (2006).

194. Objection of Amazon.com, Inc., to Proposed Settlement at 1–14, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Sept. 1, 2009), *available at* http://thepublicindex.org/docs/letters/amazon.pdf.

195. Amended Settlement Agreement, *supra* note 1, § 3.2, at 28–33.

196. *Id.* § 3.2 (d)(i), at 29–30.

197. *Id.* § 3.2(d)(iv), at 31. The ASA anticipated that Google and the BRR would work together to resolve disputes over whether books were commercially available or unavailable. *Id.* But if they could not agree, arbitration would have ensued.

The default commercialization license would not only have allowed Google to avoid incurring the very high transaction costs of book-by-book rights clearances, but would also establish standard terms for Google's use of out-of-print books. Up to 20 percent of the contents of these books, for example, could generally have been displayed in response to search engine queries.[198]

Under the agreement, Google would have had the right, and indeed, the obligation, to commercialize out-of-print books in four ways: (1) sale of access rights to individual books to consumers, (2) licensing of an ISD of books to institutions, (3) running ads next to book contents responsive to user queries, and (4) collecting revenues from libraries and other ISD subscribers for pages printed out from ISD books.[199] The settlement contemplated three additional business models—namely, print-on-demand, individual downloads of books, and consumer subscriptions—that could have been adopted in the future if Google and the BRR agreed.[200]

Under the settlement, Google would have been entitled to keep 37 percent of any revenues it made from these commercial activities and required to provide the other 63 percent to the BRR for distribution to the appropriate rights holders (from which BRR would, of course, have deducted some money to cover its administrative expenses).[201] The settlement called for close monitoring of the usages of individual books so that compensation could be allocated to the proper rights holders.[202]

This default commercialization license was another example of a private-ordering copyright-reform measure. The settling parties recognized that out-of-print books were generating no revenues for their rights holders. These books might, however, become commercially viable again because the economics of digital publishing are so different from the economics of print publishing, especially if an ISD of out-of-print books could be licensed to the very research libraries from which Google was scanning books. The default

198. *Id.* §§ 3.3(a), at 33 (granting Google a license to make display uses of books, including preview uses), 4.3 (setting forth rules about preview uses).

199. *Id.* §§ 2.1(a), at 23–24 (authorizing Google to sell ISD subscriptions and individual books and place to ads), 4.1(d), at 57 (per-page print-out fee authorization).

200. *Id.* § 4.7, at 73.

201. *Id.* § 2.1(a), at 25.

202. *See, e.g.*, *Google Books Settlement and Privacy*, EPIC.ORG, http://epic.org/privacy/googlebooks/default.html (last accessed Feb. 3, 2011) (detailing provisions of the proposed settlement that call for monitoring of uses of GBS books). Some objectors or opponents to the settlement focused on inadequacies in protection of GBS user privacy. *See, e.g.*, Privacy Authors and Publishers' Objection to Proposed Settlement at 1, *Authors Guild, Inc. v. Google Inc.*, No. 05 CV 8136-DC (S.D.N.Y. Sept. 8, 2009), *available at* http://thepublicindex.org/objections/privacy_authors.pdf [hereinafter Privacy Authors Objection].

commercialization license held out promise of generating substantial revenues for Google as well as for authors and publishers; it would at the same time have made the contents of these books more widely available, which is something Congress could decide to authorize, although it has not done so.

C. The Settlement Would Resolve Author-Publisher E-Book Rights Disputes

The GBS settlement negotiations went on for thirty months in no small part because the Guild and AAP were attempting to resolve not only issues about what Google could and could not do with GBS, but also to address disputes between them about e-book rights. The Guild and the AAP negotiators took the opportunity presented by the settlement talks with Google to negotiate a compromise solution to the very contentious issues about who, as between authors and publishers, owns the rights to authorize third parties to make and sell digitized copies of in-copyright books. As noted above, the *Random House* decision suggested that these rights might well belong to authors, although trade publishers contest this conclusion.[203]

The compromises the Guild and AAP reached were embodied in Attachment A to the GBS settlement agreement.[204] In particular, the Guild and AAP agreed that where contracts were unclear about e-book rights, authors of books published before 1987 should receive 65 percent of any revenues Google might provide to BRR from its commercialization of the books, and publishers should receive 35 percent of these revenues.[205] For books published after 1986, the revenue split was to be fifty-fifty,[206] apparently because that was the year when digital rights began to be perceived as a possible new market. Attachment A also sets forth a procedure for ensuring that authors could accomplish reversions of copyrights to which they were entitled by providing that a publisher's failure to respond to a reversion request letter within a certain time would not thwart the reversion from happening.[207]

As noted earlier, the unclarity about who owns the right to authorize the digitization and commercialization of in-copyright books is a troubling feature of the U.S. copyright landscape in the modern

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203. *See* Adams, *supra* note 95, at 45; *see also supra* notes 95–98 and accompanying text.

204. Amended Settlement Agreement, *supra* note 1, attachment A.

205. *Id.* § 6.2(i), at 9.

206. *Id.* § 6.2(ii), at 9.

207. *Id.* § 6.3, at 9–10.

era. Litigation on a case-by-case basis seems a less than satisfactory way to resolve such issues. While legislation may be a more appropriate way to address this problem, there is such a deep divide between authors and publishers on this issue that legislation seems infeasible.

Attachment A thus seems an additional example of trying to achieve copyright reform through a class action settlement. Google was, however, the only entity that would have benefited from this resolution of the author-publisher e-book rights issues. The inability of other would-be digitizers to attain a comparable resolution effectively meant that Attachment A would create a barrier to entry that would impede competition.[208]

D. The Settlement Would Address the Orphan-Books Problem

The most obvious respect in which the GBS settlement would have achieved an important measure of copyright reform was in the solution it proffered for the orphan-books problem—at least for Google. Although the settlement said almost nothing directly about orphan works,[209] it contained some important provisions affecting unclaimed works (that is, books within the settlement whose rights holders had not registered with BRR).[210] The agreement implicitly recognized that some books would remain unclaimed for the rest of their copyright terms, which meant they could plausibly be described as orphans because BRR would have been obliged to search for their owners. Some commentators have viewed the unclaimed work provisions of the GBS settlement as its single most significant component.[211]

The settlement would have had significant impacts on the availability of orphan works. Under current law, these works can arguably not be made available at all, whereas approval of the settlement would have allowed Google to make up to 20 percent of the contents of these books available for free to users of its search engine. It would also have permitted Google to make the full texts of these books available to users of public and university libraries at free terminals as well as to subscribers to the ISD.

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208. Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement at 15–16, 21–22, *Authors Guild, Inc. v. Google Inc.*, 05-CV-8136-DC (S.D.N.Y. Feb. 4, 2010), *available at* http://thepublicindex.org/docs/amended_settlement/usa.pdf [hereinafter Statement of Interest II].

209. Some provisions would allow Google and its library partners to take advantage of legislative changes, such as those affecting orphan works. Amended Settlement Agreement, *supra* note 1, § 3.8, at 45, § 7.2(b)(v), at 95.

210. *Id.* § 6.3, at 9–10.

211. *See, e.g.*, Grimmelmann, *supra* note 3.

Another significant impact of the settlement on orphan works would have been that these books would begin generating revenues again, perhaps very substantial revenues over many years, because the settlement contemplated that Google would commercialize these books for the full term of their copyrights. Under current law, commercial distribution of in-copyright books would, on its face, be copyright infringement. Google would have been obliged to pay 63 percent of the revenues it earned from commercialization of these books to BRR, whether or not the books were ever claimed.[212] The settlement further committed Google to charging profit-maximizing prices for unclaimed as well as for claimed books.[213] Because owners of rights in unclaimed books would have been unavailable to specify their preferred prices, the settlement directed Google to use an algorithm to set prices for these books.[214] The pricing algorithm was supposedly designed to mimic pricing in a competitive market.

The settlement used a clever mechanism to mitigate the orphan-works problem for books. It would have given BRR the right to use some of the money generated from Google's commercialization of the books for the purpose of searching for rights holders. Proponents of the settlement believe that these rights holders would not only be findable, but glad to sign up with BRR so they could receive their fair share of GBS revenues. It would make sense for BRR to search first for those rights holders whose books were generating the most revenues.

But the settlement also recognized the possibility that many rights holders would not be found and that funds from the commercialization of unclaimed books would remain in BRR coffers. One key question was what would happen to that money. The settlement provisions that addressed this question were an important dimension of the orphan-works reform it would have achieved.

Under the original settlement, BRR would have been directed to hold on to the unclaimed work funds for five years, after which the funds would have been paid out first to BRR-registered rights holders and then to literacy-promoting charities.[215] The DOJ objected to this allocation arrangement, perceiving it to create an intra-class conflict, for registered rights holders would have had little incentive to look for owners of unclaimed works if the registrants stood to benefit financially if the unclaimed work owners never showed up.[216]

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212. Amended Settlement Agreement, *supra* note 1, §§ 4.5(a), at 68, 6.3(a), at 9–10.

213. *Id.* § 4.1(a)(i), at 50–51, § 4.2(c), at 58–62.

214. *Id.* § 4.2(c)(i), at 60.

215. Settlement Agreement, *supra* note 1, § 6.3(a)(i), at 66.

216. Statement of Interest I, *supra* note 157, at 9–10.

To avoid this conflict, the amended settlement called for the appointment of an unclaimed work fiduciary (UWF) to make certain decisions about Google's exploitation of unclaimed works and to act as something of a gatekeeper for funds owed to rights holders of unclaimed works.[217] The amended settlement also directed that funds generated by Google's commercialization of unclaimed works be held in escrow for ten years, after which the unclaimed work funds could be paid out to charities or otherwise allocated in a manner consistent with state laws.[218]

The settlement's treatment of unclaimed books was no small matter. No one knows how many books would ultimately be unclaimed if the GBS settlement went forward. Google spokesmen have tended to offer fairly conservative estimates about the proportion of orphan books in the GBS corpus.[219] If this corpus grows to fifty million books, as some expect,[220] and the proportion of orphans remains constant, the Google estimate would yield 7.5 million orphan GBS books.[221]

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217. Amended Settlement Agreement, *supra* note 1, § 6.2(b)(iii), at 82. The only qualification ASA provided for this position is a negative one: he/she could not be a book author or publisher. *Id.*

218. *Id.* § 6.2(b)(iv), at 82, § 6.3(a)(i)(3), (a)(ii), at 84, 85. Some states objected to the GBS settlement on the grounds that their states' unclaimed funds laws do not permit the allocations set forth in the settlement. *See, e.g.*, Objection of the State of Connecticut to Amended Class-Action Settlement at 1–2, *Authors Guild Inc. v. Google, Inc.*, No. 05-CV-8136 (DC) (S.D.N.Y. Jan. 28, 2010), *available at* http://thepublicindex.org/docs/amended_settlement/Connecticut_Objection.pdf.

219. *See Competition and Commerce in Digital Books*, *supra* note 109, at 12 (statement of David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer of Google, Inc.) (estimating that 20 percent of in-copyright out-of-print books will likely be orphans). Other commentators suggest that the orphan-books problem is considerably smaller than that. *See, e.g.*, Michael Cairns, *580,388 Orphan Works - Give or Take*, PERSONANONDATA (Sept. 9, 2009, 1:03 AM), http://personanondata.blogspot.com/2009/09/580388-orphan-works-give-or-take.html (estimating that fewer than 600,000 books will be orphans). However, a recent study estimates that roughly 50 percent of the volumes in the LDC corpus maintained by the HathiTrust are orphans, Wilkin, *supra* note 116, while another has estimated that 75 per cent of the books in the GBS corpus would be unclaimed, and hence virtual orphans. Band, *supra* note 3, at 294.

220. *See, e.g.*, Letter from Paul Courant to The Honorable Denny Chin, *supra* note 16, at 1 (estimating that Google will scan fifty million unique books for GBS).

221. One disinterested source has estimated that between 2.8 and 5 million books of the roughly 30 million books in U.S. libraries are orphans. *See* William Morris Endeavor Entertainment Statement, *supra* note 158 (noting the *Financial Times* estimate). There is reason to believe that the proportion of orphans and of out-of-print books would be substantially higher as the number of books in the GBS corpus approaches 50 million, for there are only a few million books in print, and Google may be scanning most of them through the GPP, not through the library partner program.

The proportion of orphan books may, however, be higher than this, perhaps much higher.[222] "Older" books, especially those published before the 1980s,[223] are especially likely to remain unclaimed and effectively orphaned. This is in part because in the thirty years or more since the publication of these books, the publishers may have gone out of business; the authors may have passed away, be suffering from debilitating states, or be otherwise uninterested in overtures from the BRR; or heirs may be ignorant of their rights in their forebearers' books or too numerous or dispersed to track down.

There is a separate question about how valuable orphan books would turn out to be. It is, of course, too early to know exactly their value. Yet, the settlement agreement provided some hint about their perceived value. Orphan books sold through the consumer-purchase model would, for instance, have been priced by default in twelve bins, ranging from $1.99 to $29.99, with fixed percentages for each price bin.[224] The goal of the GBS pricing algorithm was to maximize revenues for claimed as well as unclaimed books.[225] Although each book in the ISD, on its own, might not be all that commercially valuable, a corpus of millions of them would be. ISD subscription prices were supposed to approximate market returns for a multi-million book database.[226] A substantial portion of books in the proposed ISD—perhaps even a majority of them—might have been orphans.[227]

A shared objective of the Guild and AAP in the settlement negotiations may have been that orphan books not be available for free or on open-access basis, as the Copyright Office and other

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222. Jonathan Band estimates that 75 percent of the in-copyright books in the GBS corpus will likely be unclaimed. Band, *supra* note 3, at 294.

223. Roughly half of the books in U.S. library collections were published before 1977 and one-third before 1964. *See* Brian Lavoie & Lorcan Dempsey, *Beyond 1923: Characteristics of Potentially In-Copyright Print Books in Library Collections*, 15 D-LIB MAG., Nov. 2009, http://www.dlib.org/november09/lavoie/11lavoie.html. Moreover, research library collections tend to include a higher percentage of older books. *Id.* Denise Covey reports that 67 percent of copyright owners of books published in 1923–29 were orphans, as were 38 percent for books published in the 1960s. Denise Troll Covey, Analysis of Orphan Works in the Context of the Google Books Settlement 1 (unpublished manuscript) (on file with author).

224. Amended Settlement Agreement, *supra* note 1, § 4.2, at 59–61 (setting percentages for algorithmic pricing bins).

225. *Id.* § 4.2(c)(ii)(2), at 61.

226. *Id.* § 4.1, at 61.

227. There is reason to think that the publishers who negotiated the GBS settlement would not include their books in the GBS ISD. *See* William Morris Endeavor Entertainment Statement, *supra* note 158 ("Few if any major publishers currently intend to make their in print [books] available for sale through the Settlement Program. . . . It appears that most major publishers will not allow their out of print books to be sold through the Settlement Program either.").

commentators have urged.[228] This would likely have made it difficult for their members' profit-maximizing books to compete with free ones. This may explain why the amended settlement does not give the UWF any power to direct Google to make unclaimed books available on an open-access basis, to suggest discounts, or to have input into ISD pricing.[229] Copyright reform for orphan books, in the Guild's and AAP's view, should not undercut the ability of profit-maximizing rights holders to obtain substantial revenues from their books through GBS.

E. The Settlement Would Expand Library Privileges

Approval of the GBS settlement would have brought about at least three significant copyright reforms affecting libraries and their patrons. One would have authorized Google's library partners to receive and make specified uses of LDC copies of books from their collections. A second was the non-consumptive research privilege that research libraries could have made of their LDCs, a privilege that would also have more generally been available to nonprofit researchers at two host sites for the full GBS corpus. A third was the settlement's commitment to provide one free public-access terminal to the ISD corpus per public library and a certain number of free public-access terminals to higher education libraries. Each is discussed below.

The GBS settlement would have loosened significantly certain constraints under which libraries now operate because of copyright rules. Section 108 of the 1976 Act does not expressly permit mass digitization of library books for preservation or other purposes.[230] The GBS settlement authorized Google to engage in mass digitization of in-copyright books and to give its fully participating library partners an LDC of the books in their collection.[231] If these partners were members of an institutional consortium with which Google had a digitization agreement, Google could have given them a copy not only of books Google had scanned from their collections, but also other books in their collections, even if Google scanned those books from another library's collection.[232]

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228. *See* U.S. COPYRIGHT OFFICE, *supra* note 75, at 11.

229. *See* Amended Settlement Agreement, *supra* note 1, §§ 6.2, at 81–83, 6.3, at 83–86.

230. *See supra* Part I.C.

231. Amended Settlement Agreement, *supra* note 1, § 7.2(a)(i), at 91. The GBS settlement provided that Google's fully participating library partners would be third party beneficiaries of the agreement as to many of its provisions. *Id.* § 7.2 (f), at 106.

232. *Id.* § 7.2(a)(ii)-(iii), at 91–92. For the sake of brevity, the conditions attached to these authorizations are omitted.

The settlement also identified several types of uses that could be made of the LDCs.[233] These included providing special access to books in the LDC for print-disabled persons,[234] replacing copies of books that had been damaged, destroyed, or stolen if unused replacements could not be obtained at a fair price,[235] deploying information-locating tools to help users identify pertinent books and to display snippets to assess relevance,[236] allowing access to orphan books if Congress enacted legislation allowing uses of these books,[237] enabling faculty and research staff to read, print, or download up to five pages from out-of-print books in the LDC for personal scholarly use or for classroom teaching,[238] and authorizing qualified nonprofit researchers to engage in non-consumptive research on the LDC corpus.[239] The settlement also provided that these libraries could make other lawful uses of LDC contents if the BRR agreed to them.[240] Libraries could obviously also make fair and other § 108 privileged uses of the LDC copies. However, the settlement constrained the use of LDCs for making inter-library loans, creating course e-reserves, or developing course-management systems.[241] The permitted library uses of LDCs under the settlement were considerably more generous in scope than § 108.

Also more generous than § 108 were the more general non-consumptive research provisions of the GBS agreement. The settlement defined non-consumptive research as "research in which computational analysis is performed on one or more Books, but not research in which a researcher reads or displays substantial portions of a Book to understand the intellectual content presented within the Book."[242] In addition to authorizing non-consumptive research on LDCs hosted by fully participating libraries, the settlement would have allowed nonprofit researchers more generally to engage in such research using the full GBS research corpus (including many books that Google does not have the right to commercialize) at two host sites.[243]

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233. *Id.* § 7.2(b), at 92–98. The agreement contemplated meetings among Google, BRR, and library representatives to discuss library uses of LDC books and a set of standards for library reporting on such uses. *Id.* § 7.5, at 114.

234. *Id.* § 7.2(b)(ii), at 92–93.

235. *Id.* § 7.2(b)(iii), at 94.

236. *Id.* § 7.2(b)(iv), at 95.

237. *Id.* § 7.2(b)(v), at 95.

238. *Id.* § 7.2(b)(vii), at 95.

239. *Id.* § 7.2(b)(vi), at 95.

240. *Id.* § 7.2(b)(ix)(1), at 96.

241. *Id.* § 7.2(c)(iii)-(v), at 98–99.

242. *Id.* § 1.93, at 14.

243. *Id.* § 7.2(d), at 99–101. The research corpus would consist "of all Digital Copies of Books made in connection with the Google Library Project." *Id.* § 1.132, at

The settlement gave five examples of non-consumptive research: image analysis (either to improve image quality or to extract information from the image); textual analysis and information extraction (e.g., concordance development, citation extraction, natural language processing); linguistic analysis; automated translation; and indexing and searching.[244] Computational parts of non-consumptive research would make, in GBS-speak, non-display uses of books in the corpus.[245] Yet, some display of book contents might be necessary to achieve the goal of specific non-consumptive research projects. A linguist who was interested in studying how usage of a certain word had evolved over time would, for example, need to be able to read portions of the texts of books that contained this word and to quote from the texts in a research paper reporting on the results of this analysis.[246] Non-consumptive research would not, then, be wholly non-consumptive.

Some academics supported the GBS settlement because of the scholarly benefits likely to flow from its non-consumptive research provisions.[247] One classics scholar contended that the GBS research corpus may be the "foundation for the reinvention of [the] field" of Greco-Roman studies because it would allow researchers to "explore larger, more challenging research projects than were ever feasible before."[248] Non-consumptive research on the GBS research corpus, he asserted, "can be an extraordinary catalyst," providing humanist

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20. It would not, however, have included books whose rights holders asked Google to remove the books from the corpus on or before April 5, 2011, nor books whose rights holders have asked to be withdrawn from the research corpus. *Id.* § 1.126(a)-(b), at 19–20, § 7.2(d)(iv), at 100.

244. *Id.* § 1.93 at 14.

245. *See, e.g.*, Sag, *supra* note 56, at 1609–20 (discussing copyright implications of non-expressive uses of copyrighted works, including non-display uses of GBS books).

246. Google has recently released a software tool, the Google Ngram Viewer, that allows users of GBS to conduct non-consumptive research on the GBS corpus. *See Books Ngram Viewer*, GOOGLE LABS, http://ngrams.googlelabs.com/ (last visited Jan. 31, 2011).

247. *See, e.g.*, Letter from Gregory Crane, Editor in Chief, Perseus Project, to The Honorable Denny Chin, Judge, S. Dist. N.Y. 1, (Aug. 7, 2009), *available at* http://www.publicindex.org/docs/amended_settlement/Crane.pdf (comparing GBS to the Human Genome Project); Letter from Michael Keller to The Honorable Denny Chin, *supra* note 71, at 3 (comparing the GBS research corpus to the Library of Alexandria); Letter from Stanford Univ. Computer Sci. Dept. to The Honorable Denny Chin, Judge, S. Dist. N.Y. 2–3, (Sept. 3, 2009), *available at* http://thepublicindex.org/docs/letters/stanford_cs.pdf (predicting order-of-magnitude improvements in learning from non-consumptive research uses of GBS).

248. Letter from Gregory Crane to The Honorable Denny Chin, *supra* note 247, at 1.

scholars with "the raw materials with which to build this new digital age."[249] It would contribute to "the emergence of a radically new, but deeply traditional form of intellectual activity"[250] and build intellectual citizenship and participation in knowledge creation by undergraduates.[251]

While it is possible that scanning books for purposes of engaging in non-consumptive research would, if litigated, be deemed a fair use of in-copyright books,[252] this is far from certain, particularly given that as the settlement defines the term, this research includes some consumptive uses. The settlement's endorsement of this research would thus have been tantamount to legislation creating a new exception to allow this type of use.

Non-consumptive research would be closely regulated by the settlement, which restricted it in some important ways. Only nonprofit researchers would have been eligible to participate in such research.[253] The settlement required non-consumptive researchers to provide a "research agenda" in advance of undertaking the research.[254] Researchers were forbidden to make commercial use of any information extracted from books in the corpus unless both Google and the Registry had expressly consented.[255] They would also be forbidden to use data extracted from the research corpus for services to third parties if such services competed with services offered by rights holders or Google.[256] These restrictions too have a quasi-legislative character.

More beneficial to the general public than the LDC and non-consumptive uses of the GBS corpus would be the provisions of the settlement that committed Google to making available, upon request, one public-access terminal per public library which would have allowed public library patrons to have full access to the books in the GBS ISD.[257] Free public access terminals to the ISD would have been available to institutions of higher education, based on the number of

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249. *Id.*

250. *Id.* at 3.

251. *Id.*

252. Sag, *supra* note 56, at 1609, 1644 (arguing that nonexpressive uses of copyrighted works may be fair).

253. Amended Settlement Agreement, *supra* note 1, § 1.123, at 18–19 (defining "qualified user" for purposes of non-consumptive research). For-profit researcher could only participate in non-consumptive research on the GBS corpus with the prior written consent of both Google and the Registry.

254. *Id.* § 7.2(d)(xi)(2), at 102.

255. *Id.* § 7.2(d)(viii), at 102.

256. *Id.* § 7.2(d)(ix), at 102.

257. *Id.* § 4.8(a)(i), at 74.

students enrolled.[258] While Google or any other private firm would always be free to provide computer terminals to public libraries, what made the settlement's commitment to these free-access terminals like copyright reform is that the settlement would authorize the display of contents of millions of in-copyright books through those terminals.

F. The Settlement Would Authorize Per-Page Printing Fees as a New Source of Revenue for Rights Holders

The GBS settlement provides that libraries and other institutional subscribers to the ISD would have to pay a fee for every page they or their patrons print out from books in the ISD.[259] The size of this fee was left unspecified in the agreement.[260] BRR was to be responsible for deciding how to allocate the per-page printing fees to registered rights holders.[261] The per-page print-out fee to be charged for ISD books was arguably another example of copyright reform through private ordering via the GBS settlement because copyright owners today do not generally enjoy a direct revenue stream from library patron copying of pages from books.

Patron copying of pages from in-copyright library books has been a contentious issue between copyright owners, on the one hand, and librarians and researchers, on the other hand, for several decades.[262] This issue, particularly as to photocopying, was debated at length during the legislative history of the 1976 Act.[263] It was one of the new

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258. *Id.* Google's willingness to provide public-access terminals to public libraries for free was somewhat less eleemosynary than it might initially sound, as Google expected that the free public-access terminals would drive demand for paid subscriptions to the ISD by public libraries that want the ISD corpus to be available to all patrons. *Session Four: Google Book Settlement Information Access Conference*, *supra* note 172 (statement of Daniel Clancy, Chief Engineer of the GBS project).

259. Amended Settlement Agreement, *supra* note 1, § 4.8(a)(ii), at 74. The settlement also limited the number of pages that could be printed out from ISD books in any one session. *Id.* § 4.1(d), at 57 (allowing printing of up to twenty pages from ISD books). The settlement also limited the number of pages that could be cut-and-pasted from ISD books to four. *Id.* Consumers who purchased GBS books would have been able to print up to twenty pages from the books they bought. *Id.* § 4.2(a), at 58–59.

260. This fee would have been set by the BRR and was supposed to be "reasonable." *Id.* The plan was for Google to collect the printing fees from the institutions obliged to pay them and provide 63 percent to the BRR. *Id.* § 2.1(a), at 23–24.

261. *Id.* § 6.1(d), at 80.

262. *See, e.g.*, WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 177–84 (1985).

263. *Id.* at 273–319.

technology controversies that held up the enactment of copyright revision bills for some years.[264]

Librarians and researchers have typically argued that it is fair use to make copies of individual articles from journals or a small number of pages from books, as well as for libraries to make such copies on behalf of their patrons as long as librarians refrained from charging more for the photocopies than was necessary to cover costs.[265] The short version of their argument runs something like this: the noncommercial and research purpose of such copies weighs in favor of fair use. Most copying for research purposes is being done from fact-intensive works, which tend to enjoy a broader scope of fair use. The amount copied by or for each patron is often only a small portion of a larger work, and only one copy is typically made. The mere fact that publishers want to charge for this type of use does not mean there is harm to the market; besides publishers have taken photocopying into account in setting the price of journal subscriptions to libraries.

Publishers have long protested that neither patron nor library copying is fair use.[266] The short version of their argument is this: the purpose of the use is consumptive, not productive (that is, no new work of authorship results from this copying, unlike the use of quotes from a previous work in a biography or history). The copying is typically done of whole works (e.g., individual articles from a journal) or significant parts (e.g., a chapter or two from a book). Publishers view photocopying as a new market for their works and seek compensation for the multiplication of copies resulting from photocopying. Library photocopying on behalf of patrons is, in their view, even more unfair than patron copying because of its more systematic and extensive character.

This issue was in heated litigation while Congress was considering copyright revision bills. Williams & Wilkins, the publisher of medical research journals, sued the U.S. government because the National Institutes of Health (NIH) was operating a service to make single photocopies of individual journal articles for scientific researchers when requested to do so.[267] A trial court initially ruled that this copying was

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264. *Id.* at 333–34.

265. *See, e.g.*, KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION 3, 16, 41–42 (1993); *see also* Samuelson, *supra* note 57, at 2580–87 (discussing fair use for purposes of promoting learning).

266. *See, e.g.*, PATRY, *supra* note 262, at 177–78, 184–85, 327 (discussing publisher arguments).

267. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1346–47 (Ct. Cl. 1973).

infringement.[268] However, a larger panel of Court of Claims judges reversed this ruling by a 4-3 majority, with the majority concluding that this nonprofit library copying for patrons was fair use.[269] Although the Supreme Court granted Williams & Wilkins petition for certiorari, the Court ultimately affirmed the Court of Claims' ruling in a 4-4 split on the merits of the government's fair-use defense.[270] Congress did not override the *Williams & Wilkins* ruling in the 1976 Act, and left photocopying issues to the vagaries of fair-use jurisprudence.

More than a decade after *Williams & Wilkins*, publishers brought a new lawsuit challenging photocopying of journal articles for research purposes in *American Geophysical Union v. Texaco, Inc.*[271] In *Texaco*, a divided Second Circuit ruled that the copying of scientific and technical articles by commercial research scientists was not fair use, in substantial part because the Copyright Clearance Center (CCC) had been established to license for-profit subscribers, such as Texaco, whose researchers wanted to make copies of articles from the journals.[272]

Perhaps because of the divided decision in *Texaco*, publishers did not bring a follow-on lawsuit challenging photocopying at nonprofit research institutions, even though much of the reasoning in *Texaco* would seemingly apply in nonprofit settings as well.[273] Another factor may have been § 108(d) of the 1976 Act which gives libraries the privilege to provide copies of one article from a journal or one chapter from a book to individual patrons as long as it is done for purposes of private study.[274] Researchers often photocopy pages from books in

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268. *Id.* at 1347.

269. *Id.* at 1353.

270. *Williams & Wilkins Co. v. United States*, 420 U.S. 376, 376 (1975).

271. 60 F.3d 913, 913, 914 (2d Cir. 1994). The Second Circuit did not address whether copying by an individual researcher would be fair use. *Id.* at 916.

272. *Id.* at 929–32. After a storm of criticism about the circularity of the harm analysis in *Texaco* (under which a use would be unfair if a publisher wanted to license it), the Second Circuit issued an amended opinion that tried to respond to this criticism. *Compare Am. Geophysical Union v. Texaco, Inc.*, 37 F.3d 881, 884 (2d Cir. 1994), *with Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 916–31 (2d Cir. 1994).

273. CCC would have been willing to license these institutions as well as profit-making firms such as Texaco. 60 F.3d at 929, n.16.

274. 17 U.S.C. § 108(d) (2006). For a discussion of this provision, see, for example, Gasaway, *supra* note 66, at 143–44. Libraries generally pay institutional subscription rates for journals that are higher than the rates that individual subscribers pay. Section 108(e) also allows libraries to reproduce an entire work (or a substantial part) if copies are unavailable for a reasonable price from trade sources or used book vendors as long as the copy is made for purposes of private study. *See* 17 U.S.C. § 108(e); Gasaway, *supra* note 66, at 145–46.

major research library collections; such copies are generally regarded as fair uses by commentators.[275]

Insofar as the GBS settlement would have required libraries and patrons to provide compensation to copyright owners for printing out even one or two pages from ISD books, it would have accomplished a copyright reform that would benefit rights holders and put new burdens on libraries and their patrons.[276] Even state-related institutions (e.g., the University of Michigan) would have been required to pay print-out fees for copies made of GBS books. This would effectively mean that copyright owners would, in this respect, get more compensatory relief from the class action settlement than they could from winning copyright lawsuits against these institutions.[277] In addition, approval of the GBS settlement might have improved the chances of success for a publisher lawsuit challenging researcher photocopying as infringement.[278]

G. The Settlement Would Broaden Access to Books for Print-Disabled Persons

Among the most fervent supporters of the proposed GBS settlement was a coalition of organizations that claim to represent the estimated thirty million persons who suffer from print disabilities.[279] Fewer than one million books are presently available in a form that is accessible to print-disabled persons.[280] Approval of the GBS settlement would, they assert, dramatically increase the accessibility of books, perhaps to as many twenty million volumes.[281] Enhanced access to

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275. *See, e.g.*, Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149 (1998).

276. *See, e.g.*, Letter from Pamela Samuelson to The Honorable Denny Chin, *supra* note 131, at 7 (objecting to print-out fees as undermining fair-use rights).

277. *See supra* notes 9–19 and accompanying text (discussing the Eleventh Amendment limitation on monetary damage awards against state-related institutions, such as universities).

278. Because the GBS settlement would have established a new market for libraries to pay for copying from in-copyright books, publishers might have argued that print-out fees are a new market that should be reserved to them under *Texaco*.

279. *See* Comments of Disability Organizations of or for Print-Disabled Persons in Support of the Proposed Settlement, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Sept. 8, 2009) [hereinafter Disability Comments], *available at* http://thepublicindex.org/docs/letters/NFB.pdf. Marc Maurer, the President of the NFB spoke in favor of the settlement at the fairness hearing. *See* Transcript of Fairness Hearing, *supra* note 3, at 14–17.

280. Transcript of Fairness Hearing, *supra* note 3, at 16.

281. Disability Comments, *supra* note 279, at 1.

books would enable these persons to become better educated and more productive members of society.[282]

For all books to whose contents Google would have had display rights, the settlement provided that Google "may provide the Display Uses in a manner that accommodates users with Print Disabilities so that such users have a substantially similar user experience as users without Print Disabilities."[283] This apparently included all books in the ISD, all books available for consumer purchases, and all books for which Google could make preview and snippet uses in response to search queries.[284] The settlement reflected Google's intent to offer a service for GBS display books that would enlarge the texts or provide voice renderings or refreshable Braille displays to accommodate print-disabled persons.[285] If Google did not implement this service within five years after approval of the settlement, it would have had to allow fully participating libraries to make arrangements with a third-party provider so that the print-disabled community's access to GBS books would be enabled.[286]

It is appropriate to think of this aspect of the settlement agreement as aimed at achieving copyright reform because although U.S. copyright law presently provides that authorized entities can make and distribute copies of previously published literary works in specialized formats for use by blind and other disabled persons,[287] this privilege is more limited in scope than advocates for the print-disabled think it should be, and relatively few books have been made available under its auspices.[288] Approval of the GBS settlement might also have contributed in a positive way to the prospects for an international treaty to improve access to books for sight-impaired persons.[289]

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282. *Id.*

283. Amended Settlement Agreement, *supra* note 1, § 3.3(d), at 34.

284. Disability Comments, *supra* note 279, at 9.

285. Google's intent to provide this service was set forth in Amended Settlement Agreement, *supra* note 1, §§ 7.2(g)(i)-(ii), at 108–09.

286. *Id.* § 7.2(g)(ii), at 109. The alternate provider would have had to enter into agreements with Google and the BRR before providing this service. *Id.* §§ 7.2(g)(ii)(2)(a)-(b), at 109–10.

287. 17 U.S.C. § 121(a) (2006).

288. Disability Comments, *supra* note 279, at 6–8.

289. *See, e.g.*, *WIPO & U.S. Copyright Office Course Addresses Access to Copyright-Protected Works by Visually Impaired Persons*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Mar. 16, 2010), http://www.wipo.int/pressroom/en/articles/2010/article_0005.html.

H. The Settlement Would Grant Safe Harbors and Releases from Liability

The GBS settlement agreement contained safe harbors for some activities which, in the absence of this agreement, would be infringing. For example, if Google made a good faith determination that a particular book was in the public domain, it could not be held liable for damages for any uses of the book or for providing downloadable copies of it to others.[290] A similar limit on liability would exist if Google mistakenly classified a book as commercially unavailable and hence subject to Google's display-use commercialization.[291]

Article X of the GBS settlement also provided a very broad set of releases from liability for claims that the plaintiff rights holders could have asserted against Google in the *Authors Guild* lawsuit,[292] including not only all claims of copyright infringement, but also claims of trademark or moral rights violations arising from its digitization of books, providing the GBS service, delivering LDCs to libraries, and other GBS matters prior to the effective date of the settlement.[293] The releases from liability would have extended to all acts authorized by the amended settlement agreement.[294]

Safe harbors and immunity from liability for copyright infringement are generally only available through legislative action.[295] In 1998, for instance, Congress enacted four safe harbors for Internet service providers (ISPs): (1) for copies made in the course of

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290. Amended Settlement Agreement, *supra* note 1, § 3.2(d)(v)(3), at 32.

291. *Id.* § 3.2 (d)(ii)-(iii), at 30 (providing that the sole remedy for mistaken determinations would be Google's prompt correction of the designation).

292. *Id.* § 10.2(a), at 140–41 (grant of release). Libraries were among the other releasees under this article of the GBS agreement.

293. *Id.* § 10.1(f), at 137–38.

294. *Id.* Neither the Authors Guild nor the McGraw Hill complaint against Google raised trademark or moral rights claims pertaining to GBS. Nothing Google has done thus far with GBS would seem to implicate either type of law. These extra-copyright releases might, however, have been needed if the settlement had been approved. Google might, for example, have started selling author, book name, or snippets of texts from books as ad words, which might implicate trademark law. The settlement would have given Google the right to alter the texts of books, which might implicate moral rights laws. It should be noted that literary works do not enjoy moral rights protection from U.S. copyright law, so it may be that state law claims would have been released. The Guthrie Objection raised concerns about the releases granted for trademark infringement. Guthrie Objections, *supra* note 2, at 13–16.

295. The Supreme Court arguably created a safe harbor from copyright liability for developers of technologies with substantial non-infringing uses in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984). However, it borrowed this safe harbor from a contributory infringement standard of the patent statute, which addressed a very similar issue. *Id.* at 440–42.

transmission of content from one user to another, (2) for system cache copies made by ISPs to facilitate user access to content, (3) for copies of content stored by users on ISPs' servers, and (4) for information locating tools (e.g., search engines) that inadvertently link to infringing content.[296]

Congress made the availability of these safe harbors contingent on certain responsible actions by the ISPs (e.g., requiring them to designate an agent to whom complaints of infringement could be directed and to take down infringing content after being given notice about it).[297] The grant of broad safe harbors from copyright infringement would thus seem to be another prerogative of Congress. Because the settlement would have achieved much the same result as if the legislature had acted, it resembled copyright reform.

I. The Settlement Would Allow Google to Avoid Federal Courts, Statutory Damages, and Injunctive Relief

The GBS settlement provided a comprehensive compulsory arbitration regime to resolve GBS-related disputes between or among Google, rights holders, claimants, the BRR, and/or participating libraries pertaining to settlement books.[298] Among the disputes covered by the arbitration regime were those over mistaken copyright ownership determinations, failure to pay compensation to BRR for some exploitations of books, discounts that should not have been granted, erroneous inclusion of a book in the ISD, and breaches in the strict security requirements set forth in the agreement.[299]

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296. 17 U.S.C. § 512(a)-(d) (2006).

297. § 512(c)(2), (i).

298. Amended Settlement Agreement, *supra* note 1, § 9.1, at 130, 9.3, at 131. Indeed, the overwhelming majority of disputes arising under the GBS settlement (e.g., among rival claimants for the same book or between libraries and the BRR) would have been subject to mandatory arbitration. *Id.* The only express exclusion was for disputes between registered rights holders and claimants for the same book; the amended settlement would have allowed the parties to decide to take this matter to court. *Id.* § 9.1, at 130.

299. *Id.* § 9.1(a), at 130–31. Guild proponents of the GBS settlement believe that the arbitration procedures would benefit authors. Authors often face difficulties when trying to assert or enforce their rights because the costs of litigation may exceed by a substantial margin the amount that can be recovered. A compulsory arbitration procedure would reduce the costs of enforcing rights. However, some author groups perceive the compulsory arbitration procedures of the GBS settlement as a negative. *See, e.g.*, Objections of Science Fiction and Fantasy Writers of America, Inc., and American Society of Journalists and Authors Inc., to the Amended Settlement Agreement 16–18, *Authors Guild Inc. v. Google Inc.*, No. 05-CV-8136 (DC) (S.D.N.Y. Jan. 28, 2009), *available at* http://thepublicindex.org/docs/amended_settlement/SFWA_ASJAObjection.pdf.

Security is obviously important to rights holders because if hackers managed to break into GBS servers and obtain copies of books from the corpus, these copies could be distributed via the Internet without compensation to copyright owners. The security requirement provisions of the GBS agreement are among its most detailed.[300] Monetary damages for breaches of security provisions were limited to actual damages and were the sole remedy available for such breaches.[301] Even reckless, willful, or intentional misconduct leading to unauthorized access to in-copyright books would have been subject only to arbitration and approximate actual damages.[302] Injunctive relief for any activities arising from the GBS settlement could only have been sought in federal court if a party to the settlement had repeatedly, willfully, or intentionally not complied with its obligations under the agreement.[303]

While parties to particular contracts can and often do provide that disputes will be arbitrated rather than litigated, the arbitration provisions of the GBS settlement set forth a sweeping and comprehensive legal dispute process that resembles a legislatively established dispute resolution scheme.[304]

J. The Settlement Would Privatize Data on Books and Their Copyrights

The settlement committed Google to developing a searchable online database about books in GBS; it would include, among other things, data about the copyright status, commercial availability (or not), and ownership rights of the books.[305] This database would be accessible by members of the settlement class via the Internet and would identify books with a copyright date after 1922 that Google had digitized or reasonably anticipated it might digitize under the settlement.[306] This

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300. Amended Settlement Agreement, *supra* note 1, § 8.1–8.7, at 115–129. The ASA would have obliged Google, participating libraries, and host sites for the GBS non-consumptive research corpus to formulate and comply with security implementation plans that would need to be updated periodically. *Id.* § 8.2, at 116–20.

301. *Id.* § 8.3(g), at 123–24. Inconsequential breaches would result in no liability. *Id.* § 8.4(a), at 124.

302. *Id.* § 8.5(b), 127. Even so, damage awards were capped at what would be available per work as a statutory damage award and Google's total liability would have been capped at $50 million for willful or intentional misconduct. *Id.*

303. *Id.* § 9.11, at 135.

304. Legislatures sometimes adopt compulsory arbitration regimes for resolving certain types of legal disputes. *See, e.g.*, Josephine Y. King, *Arbitration in Philadelphia and Rochester*, 58 A.B.A. J. 712, 712 (1972).

305. Amended Settlement Agreement, *supra* note 1, § 3.1(b)(ii), at 27.

306. *Id.* A second purpose of this database was to enable members of the class to determine whether they are entitled to compensation for Google's scanning of their books for GBS on or before May 5, 2009. *Id.*

database would be updated as Google acquired more information about books, their copyright statuses, and their owners.[307]

While the settlement did not directly call for creation of a database to track the revenues that Google would earn from various commercial uses of GBS books, it is obvious that this would have been an essential part of the GBS commercialization regime. After all, the settlement required Google to make payments to BRR for uses of in-copyright books,[308] and this could only be done through an elaborate database that kept track of which books Google was selling, for what price, and what uses were being made of ISD books. Google has also created an online database of Copyright Office renewal records which should help rights holders and potential reusers of particular books determine the copyright status of books published between 1923 and 1963.[309]

The metadata that Google plans to gather about books could turn out to be a very valuable resource in its own right.[310] The more complete the metadata collection is, the more likely it is that the Google database(s) on books will be a more useful resource than the Copyright Office for such information. However, the Google database(s) is unlikely to be accessible to the public.

The Copyright Office could undertake an ambitious project to develop a similar and more publicly accessible database about books, but this would require a Congressional allocation of resources. There is at present little reason to think that Congress will make such an allocation. Google is thus privatizing an information resource about books in copyright that a public agency has been unable to create.

III. SHOULD THE GBS SETTLEMENT HAVE BEEN APPROVED?

Recognizing that approval of the GBS settlement would have achieved results akin to legislative reforms of copyright law raises the question whether this is merely an interesting side effect of the agreement or a factor relevant to whether the settlement should have been approved or disapproved.[311] This Part makes two main points:

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307. Some objectors complained of errors in the online-books database. *See, e.g.*, Letter from Diana Kimpton to The Honorable Denny Chinn, *supra* note 119, at 1.

308. Amended Settlement Agreement, *supra* note 1, § 4.6(a), at 71.

309. *See, e.g.*, Jon Orwant, *U.S. Copyright Renewal Records Available for Download*, INSIDE GOOGLE BOOKS (June 23, 2008, 9:45 AM), http://booksearch.blogspot.com/2008/06/us-copyright-renewal-records-available.html.

310. *See, e.g.*, *Data, Data Everywhere*, ECONOMIST, (Feb. 27, 2010), http://www.economist.com/node/15557443 (discussing the importance of metadata *as a corporate asset*).

311. This Part expands upon points first made in Pamela Samuelson, Comment, *The Google Settlement*, THE NATION, Nov. 23, 2009, at 8, 10.

first, courts should engage in heightened scrutiny of the certifiability of a settlement class when the settlement would, in effect, achieve legislative outcomes, and second, that courts should engage in heightened scrutiny about the fairness of a settlement when the settlement's legislative dimensions go well beyond the issues in litigation in the case, as in the *Authors Guild* case.

Google's lawyers did not make the argument in open court that the settlement should be approved because it would achieve copyright reform.[312] The principal issue before the court at the six-hour hearing in February 2010 was whether the GBS settlement was "fair, reasonable, and adequate" to the class on whose behalf the settling parties claim it was negotiated.[313] The settling parties consequently focused much of their arguments on this issue.[314] However, several non-party supporters of the GBS settlement argued in favor of the settlement because they thought it would benefit members of the public, rather than because the settlement was fair to members of the class.[315]

At first blush, the settling parties' arguments that the settlement is fair to the class seem plausible.[316] Those who own rights in out-of-print books would benefit from approval of the settlement because Google would create new markets for these books and share a substantial

312. Google's chief legal officer, David Drummond, did, however, suggest that the settlement would provide a framework for a legislative approach to reuse orphan works in his testimony about the settlement before a Congressional Committee. *Competition and Commerce in Digital Books*, *supra* note 109, at 6 (testimony of David Drummond).

313. FED. R. CIV. P. 23(e) (setting forth this standard).

314. *See* Transcript of Fairness Hearing, *supra* note 3, at 131–43 (Boni on behalf of the Author Subclass), 143–58 (Durie on behalf of Google), and 158–65 (Keller on behalf of the Publisher Subclass). Much of the oral argument focused on class action and antitrust issues, rather than on the benefits of the settlement to members of the class.

315. *See, e.g.*, Transcript of Fairness Hearing, *supra* note 3, 5–9 (pointing to benefits for poor minorities), 14–17 (emphasizing improved access to books for print-disabled persons), 17–20 (discussing preservation of the contents of books and improved library access to books for patrons). If Google failed to provide public library or print-disabled access, however, this would not constitute a breach of the settlement agreement, because public libraries and advocates for print-disabled persons were not third-party beneficiaries of the agreement. There was no comparable provision for public libraries or print-disabled communities to the third-party beneficiary provisions of the settlement on behalf of libraries and rights holders. Amended Settlement Agreement, *supra* note 1, attachment B-1, para. 7.

316. All class members had the opportunity to opt out if they did not wish to be bound by the settlement. More than 6,500 rights holders did so. *See, e.g.*, Alison Flood, *Thousands of Authors Opt Out of the Google Book Settlement*, THE GUARDIAN.CO.UK (Feb. 23, 2010), http://www.guardian.co.uk/books/2010/feb/23/authors-opt-out-google-book-settlement.

portion of the revenues from the books with these owners.[317] The settlement may arguably be fair to those who own rights in in-print books because Google would not commercialize their books without getting their permission.[318] Even if it might not be optimal in every respect, the settling parties have argued that the settlement is fair because it offered compromises on a number of difficult issues and ensured that rights holders would be able to exercise reasonable control over Google's use of their works.[319]

The fairness of the settlement to class members was, however, challenged by hundreds of authors and publishers who objected to the GBS settlement on myriad grounds, as well as by the governments of France, Germany, and the United States who outright opposed it.[320] A full assessment of the merits of these objections is beyond the scope of this article, but their sheer volume and range does raise questions about how fair the settlement actually is.[321]

Yet, even if we assume for the sake of argument that the compromises embodied in the GBS settlement might in some general sense be fair and reasonable, does this sort of fairness satisfy the requirements for approval of class action settlements set forth in Rule 23(e) of the Federal Rules of Civil Procedure? The Supreme Court's decision in *Amchem Products, Inc. v. Windsor*[322] suggests not.

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317. Transcript of Fairness Hearing, *supra* note 3, at 147. Google's lawyer pointed out that class members who did not want Google to commercialize their books need only tell Google to stop. *Id.* at 152.

318. The impact of the GBS settlement on rights holders of in-print books was not directly mentioned by the settling parties in oral argument, although Google's lawyer made a general statement that the settlement would not harm the economic interests of any class member. *Id.* at 144.

319. *Id.* at 163–64.

320. *See, e.g.*, Statement of Interest II, *supra* note 208, at 3; French Republic Opposition Memorandum, *supra* note 2. A minister from Germany appeared at the fairness hearing to present Germany's reasons for opposing the settlement. Transcript of Fairness Hearing, *supra* note 3, at 69–73. Judge Chin noted that the objections to the proposed GBS settlement were "great in number" and some of the concerns were "significant." *Authors Guild v. Google, Inc.*, No. 05-CV-8136-DC, slip op. at 19 (S.D.N.Y. Mar. 22, 2011). He also characterized the number of class member opt-outs as "extremely high." *Id.*

321. *See, e.g.*, JAMES GRIMMELMANN ET AL., OBJECTIONS AND RESPONSES TO THE GOOGLE BOOK SETTLEMENT: A REPORT (2010) (identifying seventy-six distinct issues and eleven categories of objections filed in the GBS matter).

322. 521 U.S. 591 (1997).

A. The Need for Heightened Scrutiny of Settlement Classes for Quasi-Legislative Settlements

Amchem involved a class action settlement that would have established a compensation tribunal to resolve present and future claims for injuries caused by asbestos exposure.[323] The Court recognized that the proposed settlement in *Amchem* was a meaningful response to a real crisis; millions of people had been exposed to asbestos, and claims for damages for injuries resulting from this exposure were flooding the courts.[324] The transaction costs of litigating these cases often exceeded the amounts that could be recovered, and recoveries for similar injuries were sometimes inconsistent.[325]

The Court noted that a prominent report had recommended federal legislation to create a dispute resolution scheme to serve as a global response to the asbestos litigation crisis and that "[t]he argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure."[326] However, "Congress . . . has not adopted such a solution."[327] It is, of course, a quintessentially legislative function to identify a crisis like the asbestos litigations and formulate an administrative means to address the crisis. It is, however, a bold move to say that because a crisis exists and the legislature has not acted, a class action settlement can be used to accomplish the same objective.

The Court in *Amchem* recognized that some lower courts had been willing to approve "reasonable" settlements without a rigorous examination of the certifiability of the class.[328] However, the Court was not persuaded that this practice comported with Rule 23. It pointed to the strong criticism leveled at a proposed amendment to Rule 23 to relax the standard for certifying settlement classes that was consequently not adopted.[329] The Court inferred from the non-adoption

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323. *Id.* at 598–601.

324. *Id.* at 597–99. In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 866 (1999) (Breyer, J., dissenting), Justice Breyer noted that eighty thousand new federal asbestos-related lawsuits had been filed in the previous decade. Many more lawsuits were expected because somewhere between thirteen and twenty-one million workers had been occupationally exposed to asbestos. *See also* JUDICIAL CONFERENCE, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 33 (1991).

325. *Amchem*, 521 U.S. at 597–98, 631–32.

326. *Id.* at 628–29.

327. *Id.* at 629.

328. *Id.* at 618–19.

329. *Id.* at 619. The proposal would have allowed class certification for settlement purposes "even though the requirements of subdivision (b)(3) might not be

of that relaxed rule that federal courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper."[330] The Court further indicated that "[t]he benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the [Rule 23] inquiry."[331]

The Court's concern about the quasi-legislative nature of the proposed settlement seems to have contributed to its decision to engage in heightened scrutiny about whether the settlement class was certifiable. The need for "undiluted, even heightened, attention in the settlement context" was important because the court "will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold."[332] Other reasons for close scrutiny of settlement class certifications include the risk that a settlement may be the product of collusion among the settling parties,[333] or that the settling parties might have succumbed to the temptation to reach agreement on terms that would abridge substantive rights of absent class members in contravention to the Rules Enabling Act.[334]

Rule 23(a) of the Federal Rules of Civil Procedure sets forth four criteria for certification of a class action: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the

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met for purposes of trial." *Id.* (quoting FED R. CIV. P. 23(c) (1996 Proposed Amendment)). Professor Issacharoff has criticized the *Amchem* decision for relying on the non-adoption of this proposal, which he believes would have posed serious due process problems. Issacharoff, *supra* note 144, at 340–41.

330. *Amchem*, 521 U.S. at 622. Professor Issacharoff has criticized *Amchem* for its retreat to rules of formalism in this respect; he thinks this "obscures the otherwise extremely positive development of a due process-based analysis for the law of representative actions." Issacharoff, *supra* note 144, at 340–41.

331. *Amchem*, 521 U.S. at 622–23 (citation omitted).

332. *Id.* at 620. As Professor Issacharoff has observed: "Any settlement class that does not emerge from an adversarial posture in which there is at least a threat of going to trial must, by definition, arise from the agreement of the parties. Taken one step further, a class that cannot be formed for litigation purposes and exists only as a settlement vehicle exists by the good graces of the defendant—almost the very definition of nonadversarial relations." Issacharoff, *supra* note 144, at 348.

333. *See, e.g.*, Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1055 (1996).

334. Rules Enabling Act, 28 U.S.C. § 2072(b) (2006) (providing that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right," which was invoked in *Amchem*, 521 U.S. at 620).

interests of the class.[335] When, as in *Amchem* and the *Authors Guild* cases, plaintiffs are seeking an award of money damages that would be aggregated for class members, Rule 23(b)(3) sets forth two additional requirements: (1) common questions must predominate over individual ones, and (2) a class action must be superior to other methods of adjudicating the controversy.[336] In Rule 23(b)(3) actions, class members must be given notice of and an opportunity to opt out of the litigation or any settlement of it.[337]

In *Amchem*, the numerosity requirement was seemingly met, but the Court shared the Third Circuit's doubts about the commonality, typicality, and adequacy of representation requirements.[338] Common questions, moreover, did not predominate.[339] The Court noted that the *Amchem* settlement class not only included hundreds of thousands of people, perhaps millions, but was also "sprawling" and "amorphous."[340] Class members had experienced different levels of

335. FED. R. CIV. P. 23(a). The Supreme Court has granted certiorari in another large class action case, *Wal-Mart Stores, Inc. v. Dukes*, 603 F.3d 571 (9th Cir. 2010) *cert. granted*, 131 S. Ct. 795 (2010), to consider whether a lower court's certification of a class of female employees who claim that Wal-Mart stores have engaged in a pattern and practice of discriminating against women in pay and promotion to management positions is consistent with Rule 23(a). The Ninth Circuit affirmed class certification in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 (9th Cir. 2010) by a 6–5 en banc panel. For critical commentary on the Ninth Circuit's ruling, see, for example, Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 160–61 (2010), http://www.vanderbiltlawreview.org/content/articles/2010/11/Nagareda-Common-Answers-for-Class-Certification-63-Vand.-L.-Rev.-En-Banc-149-2010.pdf (criticizing the Ninth Circuit for failing to take adequate account of the merits of the underlying lawsuit in ruling on the certification of the class).

336. FED. R. CIV. P. 23(b)(3).

337. FED. R. CIV. P. 23(c)(2), (e)(1)(B), (e)(4). Because the GBS lawsuit, as well as the settlement, seems largely to be directed to injunctive relief, the settling parties might have considered proceeding under Rule 23(b)(2). Under this rule, the defendant must have acted in a way that is generally applicable to the class as a whole so that class-wide injunctive relief would be appropriate. Because Google was scanning books without regard to the kind of book or identities of rights holders, its actions might arguably have satisfied (b)(2). Had the parties proceeded under Rule 23(b)(2), it would have been unnecessary to notify class members about the settlement or to give them an opportunity to opt out of the class. However, because the value of each class member's claim is primarily economic in nature, because damages for past infringement (or at least compensation for claims released against Google) are part of the settlement, and because the settlement would establish a complex commercial regime affecting class members unless they opted out, the GBS settlement should be assessed under Rule 23(b)(3).

338. *Amchem*, 521 U.S. at 622–28.

339. *Id.* at 622–25.

340. *Id.* at 597, 622, 628. The settlement class approved in the *Dukes* case includes at least 1.5 million women, and perhaps as many as three million. Alexandra D. Lahav, *The Curse of Bigness and the Optimal Size of Class Actions*, 63 VAND. L.

exposure for different periods of time; they also suffered from different diseases; applicable state laws varied as well. Class-member interests were consequently "enormously diverse and problematic."[341]

The most glaring divergence, though, was between class members who were already ill and those who had yet to become ill. The former would logically favor substantial payouts as soon as possible and the latter would naturally be concerned about whether ample funds would be available for future claimants.[342] The settlement identified nine class representatives, roughly half of whom were not yet ill. Despite this, the Court found "no assurance here—either in the terms of the settlement or in the structure of the negotiations—that the named plaintiffs operated under a proper understanding of their representational responsibilities."[343] The Court concluded that there was insufficient unity of interests within the settlement class for certification to be proper under Rule 23.[344]

Although the Court in *Amchem* did not disapprove this settlement because of inadequacy of notice to the class, it did express doubts that "class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous."[345] One source of the notice problem in *Amchem* was that many people would be unaware they were members of the class until years after the settlement was approved because some asbestos-related illnesses become manifest only after long latency periods. These class members "may not have the information or foresight needed to decide, intelligently, whether to stay in [the class] or opt out."[346] It thus seemed unlikely any notice program would effectively reach them.

REV. EN BANC 117, 118 (2010), http://www.vanderbiltlawreview.org/content/articles/2010/11/Lahav-The-Curse-of-Bigness-63-Vand.-L.-Rev.-En-Banc-117-20101.pdf. The Ninth Circuit dissenters pointed to the size of the class as a concern, as did some amici who supported Wal-Mart's cert. petition. *Id.* Lahav argues that: "The relevant inquiry is whether the class is too heterogeneous to support collective treatment, regardless of the number of plaintiffs the class encompasses." *Id.* at 119. She points out that firms should not get "a get-out-of-certification-free card" just because the size of the class creates the potential for a very large damages award that would put pressure on defendants to settle. *Id.* at 127.

341. *Amchem*, 521 U.S. at 622, n.17.

342. *Id.* at 626–27.

343. *Id.* at 627.

344. *Id.* at 621–22. The Court observed that the standards set forth in Rule 23 "for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Id.* at 621.

345. *Id.* at 628.

346. *Id.*

B. Divergent Interests Within the GBS Settlement Class Raise Questions About Its Certifiability

The parallels between the *Amchem* and GBS settlements are far from exact, but they are nonetheless significant. Under the original settlement, the GBS class would have consisted of all persons who owned a U.S. copyright interest in one or more books.[347] Because of U.S. treaty obligations, that class would have encompassed substantially all book copyright owners in the world.[348] Although the amended settlement class was more narrowly defined,[349] it would likely still include tens of millions of rights holders.[350] The GBS class would seem to be larger than the proposed settlement class in *Amchem*, and as in *Amchem*, there is considerable diversity and potentially serious conflicts of interest among the GBS settlement class members, as is evident from the hundreds of objections lodged against the settlement.[351]

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347. Amended Settlement Agreement, *supra* note 1, §§ 1.16, at 3, 1.120, at 15.

348. *See* RICKETSON & GINSBURG, *supra* note 2, § 6.89, at 310.

349. *See infra* note 366 and accompanying text for further discussion of the amended settlement class.

350. The most recent Google estimate of the number of books in the world is in excess of 129 million volumes; Google seems to want to digitize all of them. *See* Leonid Taycher, *Books of the World, Stand Up and Be Counted! All 129,864,880 of You*, INSIDE GOOGLE BOOKS (Aug. 5, 2010, 8:26 AM), http://booksearch.blogspot.com/2010/08/books-of-world-stand-up-and-be-counted.html. At the fairness hearing, Google's lawyer estimated that there were 174 million unique books in the world. Transcript of Fairness Hearing, *supra* note 3, at 154. Some of these books are, of course, in the public domain. Google has estimated that 20 percent of the books it has scanned so far from libraries are in the public domain; if that percentage holds for the 129 or 174 million unique books, that would mean that well over one hundred million books are in copyright. *Id.* Some substantial proportion of these books are outside of the settlement for one reason or another (e.g., the rights holders opted out of the class, U.S. books not registered with the Copyright Office, books published in foreign countries). If half of the in-copyright books are within the settlement, that would mean that the settlement would affect owners of somewhere between 50 and 70 million books. Of course, some copyright owners have rights in more than one book, but this may be counterbalanced by the fact that many books are authored by more than one person. Moreover, attachment A recognizes that both authors and publishers may have a compensable interest in out-of-print books. Amended Settlement Agreement, *supra* note 1, attachment A, at 1. In view of this, it does not seem unreasonable to guess that the settlement class could be in the tens of millions. Another factor likely to swell the size of the settlement class is the large number of heirs who own rights in book copyrights or will own them in the future. Many of these people do not currently know they are or could become members of the settlement class. Transcript of Fairness Hearing, *supra* note 3, at 125–26. Thus, the future claimant problem that bedeviled *Amchem* is present in the *Authors Guild* case as well.

351. Many of these objections were filed on behalf of multiple rights holders. *See, e.g.*, Objection to Class Action Settlement and Notice of Intent to Appear on Behalf of Class Members Harold Bloom, et al., *Authors Guild, Inc. v. Google Inc.*,

Among these divergent interests are those of academic authors—who vastly outnumber the Authors Guild's membership—and those of Guild members in respect of their out-of-print books.[352] Academic authors are far more likely than Guild members to want their out-of-print books to be available on an open-access basis, rather than to charge profit-maximizing prices for them; academic authors would also favor modest pricing for the ISD.[353] Academics are also more likely than Guild members to think that scanning books for the purpose of indexing the contents of the books and making snippets available should be considered a fair use.[354] Since many, perhaps even most, of the books in major research library collections Google has been scanning were written by scholars for scholarly audiences, there is reason to be concerned that the Guild may not have adequately represented the interests of academic authors in the GBS negotiations, and its members' legal claims may not be typical. Such divergences also raise serious questions about whether common questions predominate as to the Author Subclass in the *Authors Guild* case.

A second divergence of interests within the GBS settlement class pertains to contractual matters. Each author and publisher whose in-copyright books are within the GBS settlement has a particular contract that allocates copyright interests. Publishing contracts contain varying terms and, as noted earlier, may be ambiguous about the allocation of e-book rights.[355] Each contract, moreover, is governed by state law, and state contract interpretation rules often differ.[356] Attachment A of the GBS settlement is tantamount to a class action settlement of the e-book rights dispute between authors and publishers, even though had the Guild brought a class action lawsuit on behalf of a class of authors against a class of publishers to resolve the e-book dispute, it is doubtful

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No. 05-CV-8136-JES (S.D.N.Y. Sept. 8, 2009), *available at* http://thepublicindex.org/docs/objections/bloom.pdf.

352. The Guild has about eight thousand five hundred members, which is far fewer than the number of full-time academics whose responsibilities typically include writing books and inserts. *See Occupational Outlook Handbook, 2010-11 Edition*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/oco/ocos066.htm (last visited Feb. 3, 2011) (estimating post-secondary teaching positions in 2008 at 1.7 million). Judge Chin gave credence to divergent interests of academic authors and the class representatives in his decision rejecting the GBS settlement. *Authors Guild v. Google, Inc.*, No. 05-CV-8136-DC, slip op. at 28–29 (S.D.N.Y. Mar. 22, 2011).

353. Letter from Pamela Samuelson to The Honorable Denny Chin, *supra* note 131, at 3–5. Academic authors would generally want to be free to annotate books and share annotations with colleagues; the Guild supported restrictions on both activities in the GBS settlement. *Id.* at 6.

354. *Id.* at 2–3.

355. *See* discussion *supra* Part I.E.

356. *See, e.g.*, *Random House v. Rosetta Books*, 283 F.3d 490, 491–92 (2d Cir. 2002) (noting New York's restrictive interpretation of contracts).

that the author and publisher classes could have been certified owing to vagaries in contract language and state law.[357] Common questions may thus, as in *Amchem*, not predominate over individual ones, calling into question the certifiability of the Author and Publisher Subclasses under Rule 23(b)(3).

A third notable divergence within the GBS settlement class pertains to the interests of rights holders who are readily findable and those who own rights in orphan books. The original settlement would have provided a windfall to rights holders who registered with BRR because revenues from others' works would have been paid out to them if the works were not claimed within five years.[358] DOJ perceived this windfall to present a conflict of interest between registered and unregistered rights holders.[359] To rectify this, the amended settlement called for the appointment of a UWF,[360] but it is questionable whether this would be an effective device to protect the interests of unclaimed-book rights holders, as it is virtually impossible to know what orphan-rights holders would want.[361] It is, moreover, impossible to give

357. Letter from Pamela Samuelson, Law Professor, Univ. Cal., Berkeley, Sch. of Law to The Honorable Denny Chin, Judge, S. Dist. N.Y. 4, n. 15 (Jan. 27, 2010) (writing a second objection on behalf of academic authors principally focused on objecting to the amended settlment), *available at* http://people.ischool.berkeley.edu/~pam/AcademicAuthorSupplemental.pdf.

358. Settlement Agreement, *supra* note 1, §§ 6.3(a)(i)-(ii), at 66–67, attachment C, 1.1(e), at 1, 2.3, at 6. Judge Chin raised questions about adequacy of representation as to owners of unclaimed works in his decision rejecting the settlement. *Authors Guild*, No. 05-CV-8136-DC, slip op. at 29–30.

359. Statement of Interest I, *supra* note 157, at 9.

360. Amended Settlement Agreement, *supra* note 1, § 6.2(b)(iii), at 82. The GBS settlement lacked meaningful guarantees of independence for the so-called "Unclaimed Works Fiduciary" (UWF) and criteria to guide the UWF in performing a fiduciary role in respect of unclaimed books. *See, e.g.*, Connecticut Objection, *supra* note 218, at 5–7 (arguing that the Unclaimed Works Fiduciary lacks true fiduciary abilities). The UWF is, for example, to be chosen by a supermajority of the BRR Board. *Id.* The BRR, not the fiduciary, was to be charged with holding on to the unclaimed funds; after five years, BRR would be authorized to use a significant portion of the unclaimed work funds to search for rights holders, although this would be subject to the UWF's approval. *Id.* § 6.3(a)(i), at 83–84.

361. The settlement would have granted the UWF a set of powers that were in some respects too limited and in at least one respect too broad. The UWF could, for instance, have chosen to change the default setting for an unclaimed in-print book from "No Display" to "Display," but not the reverse. *Id.* § 3.2(e)(i), at 32–33. The UWF would have had structural incentives to exercise the power to switch the default for unclaimed in-print books from "no display" to "display" uses in order to generate revenues that could be used to search for their rights holders to encourage them to claim the books. *See id.* § 6.3(a)(i), at 83–84. The UWF was given the power to approve changes in pricing bins for unclaimed books available through the consumer-purchase model. *Id.* § 4.2(c)(i), at 60. However, the UWF would seemingly have had no power to set prices for individual unclaimed books nor to provide input about price-

adequate notice to orphan-rights holders. This divergence poses difficulties for satisfying the typicality and adequacy of representation criteria for class certification under Rule 23(a).

A fourth divergence pertains to owners of copyrights in books and owners of rights in so-called "inserts" (such as chapters in an edited volume or multiple-authored short stories in an edited collection).[362] Book owners would receive a substantial share in whatever revenues GBS generates from Google's commercialization of the books, but revenues to insert authors would be capped at $500 total, even though these works may be licensed regularly for more than this.[363] Some authors of inserts complained that their interests were not adequately represented in the settlement negotiations, and at the very least, a subclass should have been created to represent insert rights holders.[364] This divergence in interest calls into question the adequacy of representation criterion for certification of the Author and Publisher Subclasses.

A fifth divergence in interests within the class may be between U.S. and foreign rights holders. The scope of the original GBS settlement agreement was breathtakingly large; virtually all owners of copyrights in books throughout the world would have been bound by the agreement unless they opted out of it in time. Hundreds of foreign publishers objected to this exceptionally broad definition of the class.[365] Seemingly in response to these concerns, the amended settlement narrowed the class of rights holders to those who hold rights in books first published in Australia, Canada, and the UK, plus those whose copyrights have been registered with the U.S. Copyright Office.[366] Yet, the amended settlement would still have affected a very substantial number of foreign-rights holders, in part because many foreign books

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setting of institutional subscriptions. This seems strange because all or virtually all of the unclaimed books were likely to be in the ISD and revenues derived from the ISD were likely to be substantial. The UWF was also given the power to disapprove of Google's plan to discount prices of unclaimed books, but apparently not to recommend discounts. *Id.* § 4.5(b)(ii), at 69. There would be little incentive for the UWF to agree to discounts as it would reduce the revenues over which he will have some control; BRR might also not have wanted unclaimed works to be discounted, as these books would compete with those of registered rights holders.

362. *Id.* § 1.75, at 11–12 (defining inserts).

363. Guthrie Objections, *supra* note 2, at 4–5 (citing Amended Settlement Agreement, *supra* note 1, attachment C, § 1.2 (a)-(b), at 2, (h), at 4–5).

364. *Id.* at 4–5, 12.

365. *See, e.g.*, Harrassowitz Objections, *supra* note 2, at 1.

366. Amended Settlement Agreement, *supra* note 1, §§ 1.13, at 3 (defining "Amended Settlement Class"), 1.19, at 4 (defining "Book").

have been registered with the Copyright Office[367] and in part because the simultaneous publication of a book in, say, the Netherlands, Germany, and the UK, would result in its being treated, for purposes of the GBS settlement, as a work first published in the UK.[368] Indeed, it appears that a Dutch book might be regarded as within the settlement as long as the title page indicated that the publisher has offices in London.

Objections to the settlement from foreign rights holders raised questions about the commonality, typicality, and adequacy of representation requirements of Rule 23(a) have been met in the *Authors Guild* case.[369] In particular, many foreign rights holders assert that the inclusion of their books in the settlement violated international law.[370] The Rule 23 notice requirements were, moreover, especially difficult to satisfy as to foreign rights holders.[371]

A sixth concern arises because the publishers who negotiated the settlement may not have adequately represented the interests of other publishers who would have been bound by the settlement, if approved. All of the publishers who sued Google initially are members of the GPP,[372] under which they can negotiate terms for their books that are different from and likely more favorable than the default terms offered to members of the settlement class. At the very least, the GPP terms would be more favorable than the Amended Settlement Agreement (ASA) terms in that GPP partners would not have to pay administrative fees to BRR for processing revenues from Google. The publishers who negotiated the settlement apparently did not intend to subject their books to the settlement terms.[373] If these publishers negotiated a deal

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367. Prior to 1990, foreign rights holders frequently registered copyright claims with the U.S. Copyright Office. *See, e.g.*, Letter from Arnaud Nourry to The Honorable Denny Chin, *supra* note 117, at 5.

368. *See, e.g.*, German Opposition Memorandum, *supra* note 2, at 3–4. Judge Chin also raised questions about adequacy of representation of foreign rights holders' interests in his opinion disapproving of the proposed settlement. *Authors Guild* slip op. at 29.

369. *See, e.g.*, Harrassowitz Objections, *supra* note 2, at 25–30. DOJ has also questioned the adequacy of representation as to foreign rights holders. Statement of Interest II, *supra* note 208, at 12.

370. *See, e.g.*, Harrassowitz Objections, *supra* note 2, at 13–25.

371. *Id.* at 6–12. The DOJ also questioned whether foreign rights holders had adequate notice about the proposed GBS settlement. Statement of Interest II, *supra* note 208, at 13–14. Scott Gant has questioned the adequacy of notice even as to domestic rights holders. Objection of Scott E. Gant to Proposed Settlement and to Certification of the Proposed Settlement Class and Sub-Classes at 13–22, *Authors Guild, Inc. v. Google*, *Inc.,* No. 05-CV-8136-DC (S.D.N.Y. Aug. 19, 2009) [hereinafter Gant Objection], *available at* http://thepublicindex.org/docs/objections/gant.pdf.

372. Toobin, *supra* note 19, at 30.

373. Statement of Interest I, *supra* note 157, at 10. The DOJ's first Statement of Interest regarded as "noteworthy [the fact] that the parties have indicated their belief

that they expected to bind millions of other rights holders, but not themselves, there is reason to worry that their interests and those of other class member are not well-aligned.[374] This too is a reason to question the adequacy of representation in the *Authors Guild* settlement and hence the certifiability of the class.

It is further notable that the plaintiffs in the *Authors Guild* case did not seek class certification until more than three years after initiating litigation. [375] Moreover, when they did finally did so, it was for a substantially larger class than originally claimed, the class was defined only for settlement purposes, and the settlement's terms vastly exceeded the scope of the issues in litigation.[376]

As in *Amchem*, the court reviewing the GBS settlement lacked adequate information to assess the appropriateness of the class definition (and if necessary, to adjust it) because the parties were no longer adverse about the class definition. The dangers of collusion posed by the GBS settlement are, moreover, substantial, albeit of a different character than in *Amchem*, as is apparent from the DOJ's charge that the GBS settlement might be an anti-competitive agreement to fix prices and facilitate exclusionary conduct.[377] The GBS settlement also invited the very judicial inventiveness against which the Court cautioned in *Amchem* insofar as it would have granted licenses to Google to commercialize out-of-print books that would modify and

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that the largest publisher plaintiffs are likely to choose to negotiate their own separate agreements with Google." *Id.* This provided "serious reasons to doubt that the class representatives who are fully protected from future uncertainties created by a settlement agreement and who will benefit in the future from the works of others can adequately represent the interests of those who are not fully protected, and whose rights may be compromised as a result." *Id.*

374. In this respect, the GBS settlement resembles that in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In *Ortiz*, the Court rejected a proposed settlement agreement in part because some of the lawyers who negotiated the settlement had also negotiated separate agreements to settle other asbestos cases, full payment on which was predicated on reaching the global settlement before the Court. *Id.* at 852–53. The Court recognized that this gave them an incentive to settle for less than the optimal amount for the class. *Id.*

375. Rule 23 directs that class certification should be sought "[a]t an early practicable time after a person sues . . . as a class representative." FED. R. CIV. P. 23(c)(1)(A). One empirical study of class actions has shown that motions to certify classes are generally made within approximately three to four months after the filing of a class action complaint. WILLGING, HOOPER & NIEMIC, *supra* note 142, at 8.

376. *See supra* notes 347–51 and accompanying text regarding the *Authors Guild* complaint class definition and the ASA definition. *See also* Statement of Interest II, *supra* note 208, at 3.

377. Statement of Interest II, *supra* note 208, at 16–23. There was no risk of harm to consumers from any collusive aspects of the settlement in *Amchem*; the GBS settlement, by contrast, could cause substantial harm to consumers insofar as it would facilitate collusion about prices and other terms for accessing books, as the DOJ feared.

abridge rights of the class, thereby contravening the Rules Enabling Act.[378]

Could a settlement class of authors and publishers be certified if the settlement was restricted to the issues in litigation, such that Google would pay rights holders $60 per book and $15 per insert to release Google from liability for past scanning of books to provide snippets and perhaps to engage in non-display uses of the books? Because of divergent perspectives among class members about whether scanning-to-index is fair use or infringement, there is reason to doubt this. The DOJ, however, has suggested that a properly defined class settlement might be certifiable for a modest settlement of this sort.[379]

What makes the divergent interests discussed above particularly troublesome is that the settlement goes so far beyond the relatively narrow issue presented in the *Authors Guild* complaint in order to create a comprehensive forward-looking commercial enterprise that would give Google far more rights to use in-copyright books than if it won the lawsuit. This raises the question of whether a class action settlement that achieves legislative outcomes could be deemed "fair, reasonable, and adequate" under Rule 23(e), even assuming the settlement class could be certified.

C. The Need for Heightened Scrutiny of Fairness When a Class Action Settlement Would Have Legislative Effects

Like the settlement in *Amchem*, the GBS settlement has been touted by its supporters as a fair compromise that should be approved because of the benefits it would bring about. However, *Amchem* suggests that a light review of a class action settlement is not justifiable merely because a class action settlement might bring about socially beneficial results. As the Court observed in *Amchem*: "Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view."[380] True to the

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378. *See* 28 U.S.C. § 2072(b) (2006); *see also* Gant Objection, *supra* note 371, at 10 (arguing that the GBS settlement should not be approved because would abridge substantive rights).

379. Statement of Interest I, *supra* note 157, at 7. Although Judge Chin noted that there seemed to be "troubling" antagonistic interests within the class, he urged the settling parties to renegotiate a settlement, which would seem to indicate that he thinks a revised settlement could be approved. *Authors Guild v. Google, Inc.*, No. 05-CV-8136-DC, slip op. at 20–21, 46 (S.D.N.Y. Mar. 22, 2011).

380. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997). I am aware that *Amchem* does not directly support the assertion that heightened scrutiny of the fairness of a settlement should be required if the agreement would bring about legislative-like results. Yet, *Amchem* does recognize that class action settlements can raise serious due process problems, and does express qualms about efforts to achieve

spirit of *Amchem*, courts should engage in a searching inquiry of the fairness of the settlement when it is aimed at achieving quasi-legislative outcomes.

The GBS settlement has legislative character in two key respects: First, because it would modify substantive rights of members of the settlement class, which Rule 23 plainly forbids. And second, because it would have significant spillover effects on third parties who did not participate in the settlement negotiations.[381]

Consider, for example, the fees that members of the public would have to pay for every page they printed out from GBS books, even though photocopying the same pages from physical books would likely be non-infringing.[382] Consider also the close monitoring of book usages called for in the GBS settlement, which were not accompanied by meaningful limits on uses that Google could have made of personal data about users' reading habits.[383] Users of GBS books would, under the settlement, have only limited opportunities to annotate books they purchased from Google or access through the ISD, and even more limited opportunities to share their annotations with others.[384] Approval of the settlement would likely have meant that users would pay higher prices for orphan books than if Congress enacted the open-access approach to these books that the Copyright Office recommended.

Other third-party effects of the GBS settlement would be felt by Amazon.com, Barnes & Noble, and other e-book sellers who would be unable to get an equivalent license to make available the same array of out-of-print books as Google could under the settlement.[385] The search

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legislative-like results through class action settlements, which I take to be one type of due process problem that class action settlements can pose, particularly when certifications of a class are sought only for settlement purposes.

381. Some critics of the GBS settlement were public-interest organizations who expressed concern about how the public would be affected by the settlement. *See, e.g.*, Brief for Consumer Watchdog as Amicus Curiae Opposing Proposed Settlement Agreement, *Authors Guild Inc. v. Google Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Sept. 8, 2009), *available at* http://thepublicindex.org/docs/letters/cw.pdf; Brief for Public Knowledge as Amicus Curiae Opposing Proposed Settlement, *Authors Guild Inc. v. Google Inc.*, No. 05-CV-8136 (S.D.N.Y. Sept. 8, 2009), *available at* http://thepublicindex.org/docs/letters/pk.pdf.

382. *See supra* notes 259–77 and accompanying text.

383. *See, e.g.*, Privacy Authors Objection *supra* note 202 (objecting to the settlement because of inadequate privacy protections); *Google Book Settlement and Privacy*, EPIC - ELECTRONIC PRIVACY INFORMATION CENTER, http://epic.org/privacy/googlebooks/default.html (last visited (Jan. 31, 2011) (chart of GBS settlement provisions affecting privacy).

384. Amended Settlement Agreement, *supra* note 1, § 3.10(c)(ii)(5), at 47–48.

385. *See e.g.*, Objection of Amazon.com, Inc., to Proposed Settlement, *supra* note 194. Judge Chin found this concern to be valid in his decision denying the motion

engines of Microsoft and Yahoo! would also not have access to the GBS corpus to engage in non-display uses of millions of books through which to refine their search algorithms and compete effectively with Google.[386]

A more subtle, but still troubling, type of third-party effect would be felt by class members who opted out of the GBS settlement. In general, someone who opts out of a class action settlement is in the same position they would have been in without the settlement. However, authors and publishers who opted out of the GBS settlement would not be in the same position vis-à-vis Google as before the settlement because the market for e-books and for institutional subscriptions of books would have been substantially affected by approval of the settlement, and not necessarily in a positive way for those who opted out. Some worried that Google might retaliate against them for opting out of the settlement.[387]

The GBS settlement also had a legislative dimension because it would establish a complex forward-looking commercial enterprise and a new collecting society, which go far beyond the particular issue in litigation in the *Authors Guild* case.[388] In this respect, the GBS settlement is an even more "adventuresome" use of the class action device than *Amchem*.[389] At least in *Amchem*, the goal of the settlement tribunal was to provide remedies for past wrongful acts, even if some harms had yet to become manifest. That settlement did not to give the defendants a license to engage in future acts which, but for the settlement, would be wrongful, as the GBS settlement would have done. Indeed, the whole point of the GBS settlement was to authorize Google to commercialize and make other uses of class members' books in ways that were not at issue in the *Authors Guild* case. Approval of the settlement would give Google a positive benefit that would vastly

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to approve the settlement. *Authors Guild v. Google, Inc.*, No. 05-CV-8136-DC, slip op. at 36 (S.D.N.Y. Mar. 22, 2011).

386. *See, e.g.*, OBA Supplemental Memorandum, *supra* note 188, at 16–18. Judge Chin expressed concern about the effects of the proposed settlement on competition in the search market. *Authors Guild*, No. 05-CV-8136-DC, slip op. at 37.

387. *See, e.g.*, Objections to Class Action Settlement and Notice of Intent to Appear on Behalf of Writers' Representatives LLC and Richard A. Epstein at 18, *Authors Guild, Inc. v. Google Inc.*, No. 05 CV 8136 DC (S.D.N.Y. Jan. 28, 2010), *available at* http://thepublicindex.org/docs/amendedsettlement/Writers_Representatives Objection.pdf.

388. *See, e.g.*, Grimmelmann, *supra* note 3, at 4–5 (raising concerns about the GBS settlement because of the future conduct it would permit through a privately negotiated deal).

389. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617–18 (1997).

exceed the relief to which it would have been entitled had it won its fair use defense.[390]

The DOJ characterized the GBS settlement as "a bridge too far" because it attempted to use the class action settlement process to "restructur[e] legal regimes in the absence of congressional action."[391] To the DOJ, it did not matter whether this restructuring was sensible or not; the class action settlement mechanism simply could not be used to achieve a legislative-like outcome of this scope.[392] "If there is going to be a fundamental shift in the exclusive right of a copyright holder to require advance permission, if we're going to establish compulsory licensing," the DOJ argued at the fairness hearing, "that should be done by Congress, particularly in this instance when it is not necessary to settle the underlying dispute."[393]

Although Second Circuit precedents have sometimes approved class action settlements that went beyond the claims and relief sought in a complaint, broader relief is subject to its "identical factual predicate" doctrine.[394] In *Wal-Mart Stores, Inc. v. Visa USA, Inc.*,[395] for example, the Second Circuit upheld a class action settlement that would have released claims against the defendant credit card companies beyond claims raised in the complaint.[396] The court determined that such releases were acceptable as long as the released claims arose out of the identical factual predicate set forth in the complaint.[397] Under this test, the GBS settlement could not be approved because the settlement deals

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390. Transcript of Fairness Hearing, *supra* note 3, at 118–20.

391. Statement of Interest II, *supra* note 208, at 3. The DOJ recognized some worthy objectives of the settlement (e.g., making books more widely accessible to the public, including to print-disabled persons). *Id.* at 1.

392. *Id.* at 3–5.

393. Transcript of Fairness Hearing, *supra* note 3, at 125. Judge Chin concurred in the DOJ's view, saying that "the establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court." *Authors Guild v. Google, Inc.*, No. 05-CV-8136-DC, slip op. at 22 (S.D.N.Y. Mar. 22, 2011).

394. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 (2d Cir. 2005).

395. 396 F.3d 96 (2d Cir. 2005).

396. *Id.* at 108, 124.

397. *Id.* at 108; *see also Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 16–18, 21 (2d Cir. 1981) (disapproving class action settlement that aimed to release claims as to both liquidated and unliquidated futures contracts because the complaint had only alleged violations as to liquidated contracts); *UniSuper Ltd. v. News Corp.*, 898 A.2d 344, 346–48 (Del. Ch. 2006) (upholding objection to release of claims beyond the operative set of facts that had happened in the past). Judge Chin also cast doubt on whether the GBS settlement could meet the Second Circuit's "identical factual predicate" test. *Authors Guild*, No. 05-CV-8136-DC, slip op. at 16–17 (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 107 (2d Cir. 2005)).

with so many matters beyond the facts pleaded, the claims made, and the remedies sought in the *Authors Guild* lawsuit.[398]

Seemingly to avoid these Second Circuit precedents, Google, AAP, and the Guild have argued that the forward-looking aspects of the GBS settlement should be assessed instead under the Supreme Court's ruling in *Local No. 93, International Ass'n of Firefighters v. City of Cleveland*,[399] which reviewed a consent decree under which Cleveland agreed to undertake a broader program of relief for past discrimination than originally sought in the complaint.[400]

Google argued that the GBS settlement satisfied three criteria set forth in *Firefighters* for settlements that provide for relief beyond that sought in the complaint. Those criteria are: (1) the settlement "must spring from and . . . resolve a dispute within the court's subject-matter jurisdiction"; (2) the settlement must "com[e] within the general scope of the case made by the pleadings"; and (3) the settlement must "further the objectives of the law" underlying the dispute.[401] Google has argued that the settlement was within the subject matter jurisdiction of the court because it settled the dispute over its digitization of in-copyright books and storage of the books on its servers.[402] Because the Guild and publishers complained about Google's delivery of LDCs to library partners and sought to stop copying of in-copyright books which would enable other infringing acts, Google asserted that the settlement

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398. Statement of Interest II, *supra* note 208, at 6, 11 (concluding that the identical factual predicate test may not be satisfied in the GBS settlement).

399. 478 U.S. 501 (1986). *Firefighters* reviewed the scope of a consent decree, not a class action settlement, and it obviously did not involve a forward-looking commercial arrangement. *Uhl v. Thoroughbred Techs & Telecomms., Inc.*, 309 F.3d 978 (7th Cir. 2002) is arguably closer to the issues posed by the GBS settlement. The settlement approved in *Uhl* gave class members a stake in a commercial enterprise going forward as compensation for the grant of an easement to allow the defendant to lay cable along a particular corridor. *Id.* at 980. Because the forward-looking remedy in the *Uhl* settlement grew out of the facts pleaded in the complaint, it would satisfy the Second Circuit's *Wal-Mart* test.

400. *See, e.g.*, Brief of Google Inc. in Support of Motion for Final Approval of Amended Settlement Agreement at 15–20, *Authors Guild, Inc. v. Google Inc.*, No. 05 CV 8136 (S.D.N.Y. Feb. 11, 2010) [hereinafter Google Approval Brief], *available at* http://thepublicindex.org/docs/amended_settlement/google_final_approval_support.pdf. There is substantial literature about efforts to use litigation as a means to accomplish reforms that legislatures have failed to undertake. *See, e.g.*, MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW COURTS REFORMED AMERICA'S PRISONS (1998).

401. *Firefighters*, 478 U.S. at 525.

402. Google Approval Brief, *supra* note 400, at 15–16. Google denied that live litigation was necessary for each provision of the settlement agreement, intimating that the *Firefighters* decree could not have been approved under the DOJ's more restrictive interpretation of this first criterion. *Id.* at 16.

was within the pleadings.[403] As for furthering the objectives of copyright law, Google proffered two arguments: first, because it would make books much more widely available, thereby promoting the progress of science in line with constitutional objectives, and second, because it would provide compensation to authors and give them control over Google's uses of their books.[404]

The DOJ strongly disagreed. The forward-looking commercial elements of the settlement, in its view, were not part of the legal dispute over which the court had subject matter jurisdiction.[405] Neither the Guild's nor the publishers' lawsuits charged Google with infringement for scanning books to sell copies of them or to make an ISD for licensing to libraries, both of which were at the core of the settlement Google was seeking to have approved.[406] DOJ regarded the settlement as inconsistent with the objectives of copyright law, saying: "The ASA seeks to carve out an exception from the [Copyright] Act's normal rules and presumptions, which require a rightsholder to affirmatively grant permission for the kinds of uses contemplated by the ASA."[407] Such an exception might well be justifiable, but its adoption was "a judgment better suited for legislative consideration, rather than one for courts to make in the context of approving a settlement under Rule 23."[408]

A fundamental question, then, is whether the legislative nature of the GBS settlement is merely an interesting side effect of the deal or a reason to approve or disapprove it. *Amchem* and other precedents suggest that the legislative or quasi-legislative nature of a class action settlement should not be regarded merely an interesting side effect of

403. *Id.* at 17–18.

404. *Id.* at 18–19.

405. Statement of Interest II, *supra* note 208, at 6–7. There is no actual case or controversy between Google, and the Guild and AAP, about whether it is fair use for Google to scan books to sell them to the public or to develop a subscription service to millions of books as long as it provided 63 percent of the revenues to rights holders. Google did not undertake these activities, and so the Guild and AAP could not have sued to challenge these uses. *Id.* The settling parties have leveraged a real dispute over scanning-for-snippets to achieve a global resolution about many contentious copyright issues that are beyond the issues supposedly being litigated.

406. *Id.* at 7–8. Judge Chin distinguished the *Firefighters* case from the GBS settlement because the forward-looking relief in that case sought to remedy past wrongs, and did not establish a new independent business arrangement. *Authors Guild v. Google, Inc.*, No. 05-CV-8136-DC, slip op. at 17 n.7 (S.D.N.Y. Mar. 22, 2011).

407. Statement of Interest II, *supra* note 208, at 9.

408. *Id.* at 10. Judge Chin also found merit in copyright-based objections to the settlement, *Authors Guild* slip op. at 30–36, saying that it was "incongruous with the purpose of copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission." *Id.* at 35.

the deal, nor a factor cutting in favor of the settlement. However, just because a class action settlement might bring about the same kind of result as legislation does not necessarily mean that that it should be disapproved.

Consider, for instance, a possible settlement of a class action in a case such as *Texaco*.[409] If Texaco and a class of commercial subscribers to the plaintiffs' journals agreed to settle a publisher class action lawsuit by agreeing to pay the Copyright Clearance Center for this photocopying, it might have had for the affected class of defendants the same result as if Congress enacted legislation to require such payments. However, as long as the requirements of Rule 23 were satisfied, such a settlement could be approved consistent with principles of due process because it would be tailored to provide a remedy for the legal issue being litigated in that case.

The legislative character of a class action settlement should, however, give rise to heightened scrutiny not only of the settlement class, but also of the fairness of the settlement, particularly where there has been no prior certification of the class. Among the factors that should be considered are: 1) the relative size of the settlement class, 2) the likelihood of diverse interests within the class, 3) the breadth of the settlement compared to the issues in litigation and the relief that was sought in the complaint, 4) the impact of the settlement on the future course of activities in that domain; 5) the extent to which the settlement will cause spillover effects on third parties who were unable to participate in the settlement negotiations; and 6) whether approval of a class action settlement will confer an unfair advantage on the settling defendant.

Under this multi-factored heightened scrutiny standard, the GBS settlement would not fare well: 1) the class probably includes tens of millions of people;[410] 2) hundreds of objections demonstrate significant divergent interests and legal perspectives within the GBS settlement class; 3) the settlement goes very far beyond the matter in litigation; 4) the settlement would affect the market for books for the foreseeable

409. 60 F.3d 913, 914–15 (2d Cir. 1994).

410. There is, moreover, scant evidence that the parties to the settlement ever seriously intended to litigate the scanning-for-snippets claims. As in the *General Motors* case, settlement talks began soon after the litigation commenced; the parties conducted very little discovery; there was never an attempt to certify the class, even though Rule 23 requires that this be done "as soon as practicable"; objections of some parties revealed likely intra-class conflicts; the merits of the underlying claim and valuation of the claims were undeveloped; there was a substantial mismatch between the relief sought in the complaint and the settlement terms; and large fees for class counsel raise questions about whether they were intent on maximizing the benefits of the settlement for the class or for themselves. *In re Gen. Motors Corp.*, 55 F.3d 768, 785, 787, 798–813 (3d Cir. 1995) (rejecting proposed class action settlement).

future; 5) spillover effects of the GBS settlement for third parties would be substantial, and 6) "the legal and structural changes the parties seek to accomplish would confer on [Google] a level of market dominance that other competitors without access to the ASA's special rules and procedures will be hard pressed to challenge for the foreseeable future."[411]

Consider, for instance, how the GBS settlement differs from legislation that might plausibly address some of the same issues as the settlement. It is inconceivable that Congress would pass orphan-works legislation so that only Google would have a license to commercialize orphan books. Nor would legislation addressing the author-publisher e-book ownership dispute provide a resolution of this controversy that only benefited Google. If Congress established an arbitration regime to settle disputes over whether books are in copyright or in the public domain, are in print or out, are owned for e-book purposes by authors or publishers, and/or relieved digitizers from the risk of statutory damage awards, Congress would not choose Google to be the only company able to take advantage of these limits. Moreover, if Congress decided to permit non-display uses of in-copyright books, its grant of this privilege would apply to more firms than Google. Congress would, moreover, be receptive to the concerns of privacy advocates who worry about the extensive monitoring of book usages by digital libraries such as GBS. Congress would confer with antitrust officials to get input about how to structure a statutory license to allow commercialization of out-of-print books that would be consistent with competition policy.

Because the most significant copyright reform that approval of the GBS settlement would bring about concerns orphan works, it is worth comparing the orphan-works legislation that Congress has considered in recent years and the approach adopted in the GBS settlement.[412] That legislation was modeled on recommendations of the U.S. Copyright Office, which concluded that orphan works should be freely usable if rights holders cannot be found after a reasonably diligent search.[413] The Office considered but rejected an escrow model[414] such as that embodied in the GBS settlement.

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411. Statement of Interest II, *supra* note 208, at 3.

412. *See supra* notes 75–82 and accompanying text.

413. *See* U.S. COPYRIGHT OFFICE, *supra* note 75, at 11. The Office recommended that if a rights holder later came forward to claim the work, the person who reasonably believed the work was an orphan might continue the use for future compensation. *Id.* at 115.

414. *Id.* at 11 (characterizing the escrow model as "highly inefficient" because "[e]very user would be required to make payment, but in the vast majority of cases, no copyright owner would resurface to claim the funds, which means the system would not in most cases actually facilitate payments between owners and users of orphan works").

The GBS settlement would, by contrast, establish a private escrow regime for collecting and distributing revenues Google might earn from its commercialization of orphan books. It anticipated that BRR would hold on to revenues earned from unclaimed books for ten years, after which the UWF would become a philanthropist, charged with distributing these funds to literacy-promoting charities in various countries.[415] BRR would apparently have continued to receive substantial revenues from Google for its monetization of orphan books through their full copyright terms, and the UWF would apparently continue paying these unclaimed funds to the literacy charities. The UWF did not have the authority to declare books to be orphans and authorize them to be made available on an open-access basis. Prices for ISD subscriptions were consequently unlikely to fall even after a substantial percentage of the unclaimed books were determined to be orphans.

The GBS settlement did anticipate that Congress might pass legislation affecting orphan books. It would give the UWF authority to license copyright interests in unclaimed books to third parties "to the extent permitted by law."[416] Existing law does not permit *any* licensing of in-copyright books to third parties without the rights holders' permission. The only way that the UWF could get the legal authority to issue such licenses would be from Congress, presumably through the passage of orphan-works or extended collective-licensing legislation.[417] The UWF would have a financial stake in the continuation and extension of the escrow regime and in persuading Congress that escrowing under the UWF's aegis was the best solution to the problem posed by unclaimed works. Google and the other settling parties might support the UWF as an intermediary for the licensing of orphan books to third parties.[418] In this way, approval of the GBS settlement might well have intruded on Congressional prerogatives.[419]

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415. Amended Settlement Agreement, *supra* note 1, § 6.3(a)(i)(3), at 84.

416. *Id.* § 6.2(b)(i), at 81.

417. Extended collective licensing is widely used in the Nordic countries to allow a license to extend beyond the rights holders who have signed up with a collective management organization for administering copyrights; extended collective licenses are generally adopted by legislation or governmental actions. *See, e.g.*, Koskinen-Olsson, *supra* note 192.

418. *See Competition and Commerce in Digital Books*, *supra* note 109, at 6 (statement of David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer of Google, Inc.) (suggesting the GBS settlement as a framework for orphan-works legislation).

419. *Session Four: Google Book Settlement Information Access Conference*, *supra* note 172, at 68 (prepared statement of Marybeth Peters, Register of Copyrights) ("[T]he [GBS] settlement would inappropriately interfere with the on-going efforts of Congress to enact orphan-works legislation in a manner that takes into account the

The eleemosynary impulse underlying the literacy charity provisions of the GBS settlement may be commendable, but escrowing funds from orphan books is not the appropriate approach to making orphan books more widely available. Once books are known to be orphans, they should be freely available for use by all, as the Copyright Office has recommended. This would be more consistent with the utilitarian purpose of U.S. copyright law, insofar as these works lack an author or publisher who arguably needs exclusive rights to recoup investments in creating and disseminating these works. An institutional subscription to orphan books should be priced to allow recoupment of the costs of providing this service, but not to maximize profits for those rights holders who cannot be found through the end of the copyright terms.

There is the further concern that approval of the GBS settlement would set a precedent that would encourage other similarly audacious class action settlements.[420]

CONCLUSION

The GBS settlement is perhaps the most adventuresome class action settlement ever attempted. There are numerous respects in which the settlement, if approved, would have brought about results akin to reform of U.S. copyright laws. This would include not only an effective expansion of exceptions and limitations to copyright law for Google, its library partners, and print-disabled persons, but also a de facto grant of a compulsory license to allow commercialization of out-of-print books, including those that are "orphans," as well as a solution to the e-book ownership dispute between authors and publishers. This Article has argued that the legislative nature of the proposed GBS settlement is a factor that should give courts pause. It has pointed to numerous divergences in interests among class members, which suggests that there may be insufficient unity of interests within the settlement class for the GBS class to be certifiable under Rule 23. And although the settlement as a whole may seem "fair" in some general sense of this term, it may not be fair in the sense required by class action law because it would significantly alter the substantive rights of class members.

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concerns of all stakeholders as well as the United States' international obligations."). Judge Chin thought that Congress was the appropriate venue for addressing orphan-works issues. *Authors Guild v. Google, Inc.*, No. 05-CV-8136-DC, slip op. at 22–24 (S.D.N.Y. Mar. 22, 2011).

420. *See, e.g.*, Grimmelmann, *supra* note 3, 12–13, 15; Samuelson, *supra* note 3, at 1355, 1357, 1359.

Non-approval of the GBS settlement will not have as dire a set of consequences as some commentators seem to believe.[421] For one thing, Google is continuing to scan books for GBS, to serve up snippets in response to user queries, to provide links to libraries or bookstores from which the books can be lawfully acquired, to provide libraries with LDCs which they can use for lawful purposes, and to work with authors and publishers on making as many books available through GBS as it can. Google can be expected to make efforts to determine whether books are orphans; it may even be willing to make more of the contents of these books available to the public on the theory that fair use should be broader for orphan books than non-orphans, with or without orphan-works legislation. Inspired by GBS, university research communities may be able to self-organize to encourage colleagues to make their out-of-print books available on an open-access basis, so that a corpus of scholarly books might be curated for licensing at modest prices and on otherwise academically reasonable terms

Non-approval of the settlement may also renew interest in orphan-works legislation and in the free-access model for orphans that the Copyright Office recommended rather than the escrow model embedded in the GBS settlement. Also quite possible—and much to be desired—is a more comprehensive legislative package that would enable the achievement of the socially beneficial aspects of the GBS settlement, while mitigating or resolving the downsides of that deal.[422] It would, for instance, be a desirable copyright reform for libraries, among others, to be able to digitize in-copyright works for preservation purposes, to allow patrons to engage in non-consumptive research, and to be able to subscribe to an ISD of out-of-print books, with some revenues from this service going to rights holders. Public library access terminals to such an ISD would also be desirable, and maybe it is a fair trade-off to get some free access in exchange for print-out fees, as the GBS deal proposes. Indeed, most elements of the GBS settlement would seem to be in the public interest, except for the fact that the settlement restricts the benefits of the deal to Google.

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421. *See, e.g.*, Tim Wu, *Save the Google Book Search Deal!*, SLATE (Sept. 29, 2009, 12:51 PM), http://www.slate.com/id/2229391/ ("To punish Google by killing Book Search would be like punishing Andrew Carnegie by blowing up Carnegie Hall.").

422. Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUM. J.L. & ARTS (forthcoming 2011). Judge Chin regards the orphan-books problem as more suitable to Congressional resolution than to judicial decision-making. *Authors Guild v. Google, Inc.*, No. 05-CV-8136-DC, slip op. at 22–24 (S.D.N.Y. Mar. 22, 2011). He nevertheless urged the settling parties to re-negotiate a settlement of the *Authors Guild* lawsuit, emphasizing that concerns about the settlement would be "ameliorated" if it was structured as an opt-in regime rather than an opt-out regime. *Id.* at 46.

In keeping with the intergenerational equity theme of this Symposium, this Article expresses hope that the public good epitomized by the GBS corpus can be realized so that the accumulated knowledge of humankind contained in millions of books from major research library collections can be made widely available to future generations through digitally networked environments. It would be a tragedy not to try to bring this vision to fruition, now that it is so evident that the vision is realizable.